THE
MADRAS LAW JOURNAL.

VOL.] JULY, 1927. [LIII

NOTES OF INDIAN CASES.

CHATTAR SINGH *v.* KAMAL SINGH, I L R 49 A 276(F B).

Pending an application for execution, an injunction was passed staying execution. After the disposal of the suit the application was struck off as upon a default of prosecution without notice to parties and within 3 years of the disposal of the suit, an application in the form of an execution petition was made for execution. The question was whether the application was barred. If S. 15 of the Limitation Act applied, the application would have been barred as deducting the period during which there was the injunction, the petition was more than three years from the last application. The Full Bench, we think rightly, considers that that section is confined to cases of fresh application and not to cases of continuance or revival. This proposition does not extend to saying that if there was a pending application for execution at the date of the injunction or stay the section would not apply. The section would apply when the particular application has been, after the dissolution of the injunction, properly disposed of and a fresh application for execution has got to be filed. There is a distinction between suits and applications for execution observable in the section appropriate to the nature of each. Whereas in the case of a suit, the section is available only in cases where the institution of the suit has been stayed, in the cases of applications for execution, it would apply even in cases where only execution is stayed, that is to say it would apply to cases where there is a pending execution and further proceedings have been stayed.

The only trouble about the decision that we feel is when the application has been pending till the disposal of the suit, how any further disposal proper or improper can bring into operation the doctrine of continuance or revival. At the time,

the obstruction was removed the application was pending. To a pending application, there could not be any question of applying any rule of limitation, nor could it be suggested that a party is at liberty not to take any further steps for 3 years after the removal of the obstruction and any disposal before the expiry of that period on the ground of the default of the party is *ultra vires*. We therefore think that a more satisfactory ground of decision would have been to say that the order "striking off" was unknown to law and the execution should still be considered pending and there is no limitation for carrying on a pending application for execution just as there is none to carry on a pending suit unless there is a definite provision of law requiring an application to which limitation might be properly applied. The point is well illustrated by contrasting applications to pass final decrees in mortgage suits with those to make final decrees in partition or partnership actions. The former are governed by limitation, the latter not. The law requires a definite application in the former case while none is contemplated in the latter.

SHEOBARAN SINGH *v.* KULSUMUNNISSA, I L R 49 All 367: 52 M L J 658 (P C).

The question in this case was as to whether the custom of pre-emption avails against a sale by the Official Assignee in whom the property of the co-sharer has vested on bankruptcy. Their Lordships hold, it does.

Viscount Dunedin meets the argument of the Allahabad High Court that the custom which applies to voluntary sales by one co-sharer cannot apply to the case of an involuntary sale carried out against his wishes by a Court through a Collector or Official Assignee thus: "This overlooks one of the fundamental principles of all arrangements for the realisation and distribution of a bankrupt's property. In every system of law the term may vary but in all there is an official, be he called an assignee or trustee or any other name and that official is, by force of Statute, invested in the bankrupt's property. But the property he takes is the property of the bankrupt, exactly as it stood in his person with all its advantages and all its burdens. . . . If the view of the learned Judges were right the bankruptcy of *A* would have the double effect of forfeiting something belonging to *B* and of rendering the property of *A* more valuable in the hands of his Official Assignee than it was in his

own". The distinction between sales in execution and sales by the Official Assignee is explained thus: "The Code of Civil Procedure arranging for sale under a decree mentions and deals with rights of pre-emption and gives those who hold them certain rights. Whenever a Statute deals with certain rights it is easy to conclude that it deals with the total ambit of those rights and leaves nothing standing outside the provisions of the Statute." In construing clauses in leases restricting alienation the rule adopted is that *prima facie* a contractual restriction of assignment does not apply to the assignment by a person on whom the property has devolved by operation of law and who is under an obligation to assign. *Berbeak Permanent Benefit Building Society,* In re (1). But the position is not identical and the law is not necessarily logical.

FAZAL KHAN *v.* THE CROWN, I L R 8 Lah. 136.

There is a conflict of authority on the question as to the proper construction of S. 439, cl. (4) of the Criminal Procedure Code (V of 1898). The decision under notice takes the view adopted by the Madras High Court in a considered judgment, in the case of In re *Bali Reddi* (2) and holds that the power of the High Court as a court of revision to alter the finding and enhance the sentence under the provisions of S. 439, cl. (1) is not taken away under S. 439, cl. (4) except in cases when there has been a *complete* acquittal of the accused. The Allahabad and Bombay High Courts, however, have taken a different view and hold that S. 439, cl. (4) applies to cases of partial acquittal also. See *Emperor* v. *Sheo Darshan Singh* (3) and *Emperor* v. *Shivputraya Durdundaya* (4). The Madras High Court also has recently followed this latter view in preference to the earlier one. See In re *Subba Chukli* (5). Some decisions hold that it is open to the High Court as a court of revision to enhance the sentence under S. 439, cl. (1) in cases of partial acquittal, only in cases where the High Court is at the same time exercising its appellate powers in an appeal against the conviction by the accused and that where there is no appeal by the accused, the High Court cannot enhance the sentence. *Kan Thein* v. *Emperor* (6). We do not see any justification

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1. (1913) 2 Ch 34.
2. (1913) I L R 37 M 119.
3. (1922) I L R 44 A 332.
4. (1924) I L R 48 B 510.
5. (1925) I L R 50 M 259 : 52 M L J 707.
6. (1926) I L R 4 Rang 140.

for this intermediate view. It will be noted that there is no doubt as regards the power of the High Court to order a re-trial. The only question on which there is a difference of opinion is whether the High Court can itself convict the accused in a proper case of the major offence of which he has been expressly or impliedly acquitted and enhance the sentence. The view taken in In re *Bali Reddi* (1) seems to be the sounder view, but in view of the numerous decisions to the contrary, it is desirable that the Legislature should make the matter clear by appropriate amendment of the terms of the section.

ARJAN DAS *v.* THE CROWN, I L R 8 Lah. 196.

It is useful and interesting to note that this decision is an express authority for the position that a railway passenger can in a proper case make use of an alarm-signal for protection of valuable property, even though there is no apprehension of danger to the person. There is nothing in the language of S. 108 of the Railways Act to confine the use of the means of communication, only to cases where lives of passengers are endangered or to cases of theft with violence. Notwithstanding the statements usually found in Railway guides, it may not be an offence to stop the train in cases where valuable articles of a passenger are thrown out maliciously by a fellow-passenger as happened in the particular decision under review.

BULLI GANGI REDDI *v.* BULLI TAMMI REDDI, I L R 50 M 421 : 52 M L J 524 (P C).

In this case, their Lordships take it for granted (the proposition was not questioned) that it is within the power of the Karta of a Hindu family to endow a small portion of the family property for the purpose of religious charity even without the assent of the other members and that this could be done without any instrument in writing. But for the appropriation to be valid, it must be by act *inter vivos* and not by will.

Their Lordships reversed the judgment of both the Courts below in this case which had inferred a dedication from the application of the income of a particular property to the charity. Their Lordships reject the inference from the fact that the entire income was not so applied and from the fact that for some time other income was being so utilised.

1. (1913) I L R 37 M 119.

SHRAVAN GOBA *v.* KASHIRAM DEVJI, I L R 51 Bom. 133.

We are not sure whether this decision has not disclosed a piece of inartistic drafting in the language of Ss. 19 and 19-A of the Indian Contract Act in so far as it purports to restrict the right of avoidance of contracts induced by fraud, misrepresentation or undue influence to those on whom such fraud, misrepresentation or undue influence has been exercised without extending it to their representatives in interest as well. There seems to be no reason to so restrict it as pointed out by the learned Chief Justice in this case. In England it has been held that in the case of fraudulent conveyances, the equitable title in the properties conveyed continues with the grantor and it can pass to his executors, devisees and trustees in bankruptcy who can avoid the conveyance and call in the legal estate. In this connection, it may be noticed that the language of S. 86 of the Indian Trusts Act, which applies to such class of cases could have been happier and more comprehensive as it lends itself to the suggestion that in cases of conveyances liable to rescission, the property should be held for the benefit of the *transferor* on the receipt of a notice of rescission by him. In this state of difficulty on the language of the sections, the learned Judges had necessarily to rely on the doubtful ground of S. 88 of the Trusts Act which it is not easy to apply to this case as the learned Chief Justice has negatived any antecedent fiduciary relation between the parties. S. 35 of the Specific Relief Act which answered the purpose in the present case cannot in terms apply to cases of oral contracts voidable for fraud, etc. Again the other sections of the Indian Contract Act referring to the rights and liabilities of the representatives of contracting parties alluded to by the learned Chief Justice in this case as showing the intention of the legislature are by no means an uncertain guide as they may lead to the contrary inference on the principle of *expressio unius* as suggested in *Govind Ramaji* v. *Savitri* (1). The most satisfactory solution will therefore be for the legislature to clear up the language, in the absence of which we must take it that even though the language is inapt, the intention of the legislature is as pointed out by the learned Chief Justice in this case.

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1. (1918) I L R 43 B 173.

HIRABAI JEHANGIR *v.* DINSHAW EDULJI, I L R 51 Bom. 167.

Once it is recognised that it is not the entire body of rules of the English Common Law that are applicable to the Parsis in Bombay but it is possible to discriminate between the rules under the limitation of what are "just and right," it would have been simpler and more intelligible to have rested the decision in the case by doing away with the requisite of special damage in the cases of slander of all kinds to render them actionable. The rule of English Common Law by which damage is assumed and not required to be proved in some specified cases of slander and that in other cases, damage flowing out of the slander has to be specifically proved has been held to be illogical, artificial and devoid of principle by the Court of Appeal in England in *Jones* v. *Jones* (1) and by Lord Wrenbury in the House of Lords in the same case on appeal in *Jones* v. *Jones* (2) though Lord Sumner would seem to think that the distinction is based on principle though not ideally logical. The growth of this branch of law in England and its limitations rest on historical accidents relating to ecclesiastical courts, as pointed out by Lord Haldane, which have no relation to this country. If the ground of the decision of the learned Judges in this case is right, it would seem to follow that if the imputation of immorality were made of an unmarried woman, the slander would not in such a case be actionable *per se,* a state of law which even in the words of English Judges has been styled as unsatisfactory, cruel and even barbarous [*Lynch* v. *Knight* (3), *Roberts* v. *Roberts* (4), see also *Parvathi* v. *Mannar* (5)] and which has since been rectified in England by legislation. Again the ground of decision adopted by the learned Judges in the decision under notice is by no means simple in its application to the case, as each one of the questions whether the act should be criminal according to the English law or Indian law, or whether it should be an offence under the Indian Law of 1823, the date of the charter or of the present day and whether adultery is at all an offence on the part of the married woman even at the present day in India, is by no means clear. With all this, there will still remain the anomaly that on this decision a slander imputing immorality to a Parsi unmarried lady in the mofussil would be actionable *per se* while in the City of Bombay it would not be so actionable.

1. (1916) 1 K B 351. 2. (1916) 2 A C 481.
3. (1861) 9 H L C 577 at 594. 4. (1864) 5 B & S 384 at 389.
5. (1884) I L R 8 M 175.

ABDUL RAHMAN *v.* KING-EMPEROR, I L R 5 Rang. 53 : 52 M L J 585 (P C).

MUKAND SINGH *v.* KING-EMPEROR, I L R 8 Lah. 230 (P C)

These two decisions of the Privy Council considerably narrow the scope of the application of the principle laid down by the Judicial Committee itself in the well-known case of *N. A. Subramania Aiyar* v *King-Emperor* (1). It must now be taken that disobedience to an express provision of law as to a mode of trial is not sufficient by itself to vitiate the conviction. Their Lordships explain their previous decision in *N. A. Subramania Aiyar's Case* (1) as a case where the Court adopted a procedure which the Code *positively* prohibited and where it was possible that such procedure *might* have worked actual injustice. The first of the two decisions noted above also lays down that the well-established practice of the Privy Council limiting the jurisdiction of the tribunal in criminal appeals to interference "only where substantial and grave injustice is done, either by disregard of forms of legal process or by some violation of the principles of natural justice or by similar cause" [see *In re Dillet* (2)] is equally applicable to appeals which have been entertained by special leave. It was the application of this principle that led to the dismissal of the petition for special leave in the second of the two cases. Though their Lordships do not give any reasons, it must also be taken that, in their opinion, the decision in *Subramania Aiyar's Case* (1) was not applicable to the facts before them as the offence of conspiracy under S. 120-B, Indian Penal Code, was newly created only by Act VIII of 1913. The conviction for the first charge of conspiracy was therefore sustained, the other charges being merely taken as overt acts to prove the conspiracy alleged.

BHIM SINGH *v.* LIQUIDATOR, UNION BANK OF INDIA, I L R 8 Lah. 167.

The soundness of this decision is open to question. We think that the view of the Allahabad High Court in *In the matter of the Union Bank, Allahabad, Ltd.* (3), from which the decision under notice expressly dissents, is more in consonance with the intention of the Legislature. The result of holding that the application for compensation, for misfeasance, etc., on the

1. (1901) I L R 25 M 61 : 11 M L J 233 (P C).
2. (1887) 12 App. Cases 459. 3. (1925) I L R 47 A 669.

part of directors or other officers of a company under S. 235 of the Indian Companies Act (VII of 1913), is governed by Art.36 of the Limitation Act and that time begins to run from the date of the alleged misfeasance is to nullify the scope and usefulness of the remedy that is provided. The misapplication or misfeasance may not, in the majority of cases, be discovered at all within two years. Apart, however, from the policy of the Legislature, it is difficult to see how the liquidator's rights can be taken away even before his appointment. It is true that S. 235 does not create new rights which did not exist before, but that dictum must be understood only with reference to the substantive rights and obligations of the delinquent parties and it does not bear on the question of the starting point for limitation. The decision of the Court of Appeal in *In re City Equitable Fire Insurance Company, Ltd.* (1) is not an authority on the question of limitation. That case merely decided that if an officer of the company was not liable under the Articles of Association except for wilful default, the plea was available to him as a defence to a "misfeasance application" just as it would have been a proper defence in an action by the company itself. The extent of liability is not wider in the former case. The question of the starting point of limitation is however different, where the liability is otherwise established. It was held under the Indian Companies Act of 1882 that there was no limitation applicable to such applications. See *Ramaswami* v. *Streeramulu Chettiar* (2) and *D. Connell* v. *Himalaya Bank, Ltd.* (3). S. 214 of Act VI of 1882 no doubt did not contain a clause similar to cl. (3) of S.235 of the present Act (VII of 1913). The result of the change is to make Art. 120 of the Limitation Act applicable to such applications as otherwise they might be governed by Art. 181 of the Limitation Act which now governs applications not merely under the Civil Procedure Code but other Acts as well. The object of the Legislature was presumably to extend the period from three years to six years. It is well settled that limitation cannot commence to run when there is no person competent to sue or apply. Reference may be made to the observations of the Privy Council in *Meyappa Chetty* v. *Subramaniam Chetty* (4). It cannot be that the right to obtain relief under S. 235, cl. (1) is barred even before the date of the order for winding up.

1. (1925) 1 Ch 407. 2. (1896) I L R 19 M 149.
3. (1895) I L R 18 A 12. 4. (1916) L R 43 I A 113 (P. C).

RAM GOPAL MARWARI *v.* BENGAL AND NORTH-WESTERN RAILWAY COMPANY, I L R 6 Pat. 256.

Under S. 77 of the Indian Railways Act (IX of 1890) a claim against a Railway Administration for compensation for loss of goods during transit must be preferred in writing within six months from the date of delivery of the goods. S. 140 of the same Act allows a notice to be served by forwarding it by post in a registered pre-paid letter. The question in the above case was about the validity of the claim where the notice was posted within six months but was actually received by the agent in the usual course of delivery only after the expiry of the six months period. It was held that the claim was preferred as contemplated by S. 77 when the letter was posted. We have doubts about the correctness of the decision. The conclusion seems to have been reached by assuming that service by post is the only authorised mode of preferring a claim. This is obviously wrong as S. 140 itself provides for other methods of service of notice. It may also be pointed out that the judgment does not refer to S. 142 which has a direct bearing on the point under discussion. In cases where a party chooses to send in his claim by post, it must be deemed to have been preferred only at the time when the letter containing it would be delivered in the ordinary course of post. This must be ascertained as a question of fact in each case and this will not necessarily be either the day of posting of the letter or the day of the actual delivery of the same to the addressee.

ABADI BEGUM *v.* KANIZ ZAINAB, I L R 6 Pat. 259 : 52 M L J 430 (P C).

One of the essential conditions for the validity of a wakf under the Shiah Law is the transfer of possession of the endowed properties from the settlor to the trustee or mutawalli. Where the settlor appoints himself as the first mutawalli, no change of possession is physically possible but none the less it is incumbent on the settlor to give such possession as the case admits. The observations of their Lordships as regards the necessity for a change in the character of possession are noteworthy. It would seem to be necessary according to their Lordships that there should be a mutation of names in the public registry evidencing the change in the holding of the endowed lands by the wakif not in his original capacity of

owner but in his capacity of mutawalli. Their Lordships held in the above case that the wakf was invalid, as there was no such change of possession and mutation of names in the revenue papers notwithstanding the long lapse of time and more especially because of the failure of the wakif to effect the necessary change during re-settlement proceedings. It should not be understood, however, that the absence of such a mutation of names is always conclusive on the question of "transfer of possession." Such an omission is generally significant and would ordinarily go very far to negative a change of possession. But this is only one of the circumstances that bear on the question and may in proper cases be capable of an explanation. We do not think that the Privy Council intend to lay down that the absence of mutation of names is by itself fatal to the validity of the wakf. Nor does the decision in *Hamid Ali* v. *Husain Khan* (1) to which their Lordships refer, go to to that extent.

In the particular case, the wakf would also be invalid as the wakif had reserved an interest in herself out of the income of the wakf properties over and above what might have been legally reserved as remuneration to herself as mutawalli. The Shiah Law is perfectly clear on the point and does not allow "the wakif to eat out of the wakf". Notwithstanding the somewhat cautious reservation by their Lordships of their final decision on the point, it must also be taken that in such a case of even a partial reservation of benefit by the settlor in her favour, the wakf will be wholly void and cannot be regarded as valid to the extent of the unreserved dedication.

ASKARI HASAN *v.* JAHANGIRA MAL, I L R 49 All. 297 (F B).

The view taken by the Full Bench of the Allahabad High Court in this case is that when a compromise decree provides for payment of a certain amount in instalments and not on a fixed date, that is to say within six months from the date of declaring the amount, O. 34, R. 5 does not apply and no application for a final decree is necessary. This is in accordance with the view of the Calcutta High Court in *Bechu Singh* v. *Bicharam Sahu* (2). The true basis of the decision is as pointed out by Mr. Justice Mukherjee in *Biswanath Prasad* v. *Bhagwandin Pandey* (3) that it is open to parties to waive a final decree and a decree for payment in instalments without

1. (1902) I L R 24 A 257.
2. (1909) 10 C L J 91.
3. (1911) 14 C L J 648.

fixing the date involves such waiver. We do not quite see that an instalment decree should necessarily lead to such inference. The decree might direct payment within six months and direct sale on failure, in which case, there is no need to infer that the parties agreed to waive the final decree. The extreme view taken in *Abir Pramanik* v. *Jahar Mahmud Mandal* (1) that the procedure of O. 34, R. 5 is excluded in the case of consent decrees seems also to be unjustified. The whole question, we think, should be whether or not the parties agreed to waive a final decree. If that is the right inference on the wording of the compromise decree a further final decree is unnecessary; otherwise, it is necessary.

SUKHBIR SINGH *v.* MANGEISAR RAO, I L R 49 All. 302.

The point in this case was as to whether the custom of Swayamdatta adoption was proved. It was held that such a custom was not established by showing that the Gwalior Durbar allowed such adopted sons to succeed to jaghirs if the adoption took place with their sanction. The Hindu Law being personal law, it might be open to the Gwalior Maharaja in his sovereign capacity to alter the law as to jaghirdars there being no clear distinction between legislative and executive functions of the Sovereign in these States. But no such thing could be predicated in a case like the present. The Gwalior Durbar did not purport to vary the rule of Hindu Law so far as such families were concerned. It only recognised the title of such adoptees if it chose.

ALI BAHADUR *v.* RAFI-ULLAH, I L R 49 All. 310.

Obviously there must be a slip in the headnote in this case. The Judges seem to follow the Madras view that O. 22, R. 4. applies to mortgage suits in the stage after the preliminary decree and before the final decree. The view leads to serious hardship such, we think, as to require legislative interference. The Privy Council held in a recent case that a suit for partition could not be dismissed after preliminary decree has been passed. The same argument is applicable to mortgage suits after a preliminary decree for sale and it is quite open to argument that the right is no longer a mere right to sue but a right to have the decree carried out though it might not be execution as understood by the Civil Procedure Code.

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1. (1907) I L R 34 C 886

NARAIN DAS *v.* CHIMMAN LAL, I L R 49 All. 321.

The words "suspended payment" would seem to be a technical term and involve an intention to stop payment to everybody and not merely to one particular creditor either because liability to him is denied or for any other reason good or bad.

But we do not quite see why the Court cannot act under S. 56 and direct the receiver to make good any loss sustained by it by his wilful negligence or gross default. In the case of ordinary receivers in suits the Court does not become *functus officio* in this matter when for instance the suit is dismissed and as such the receivership comes to an end. A different conclusion is not necessitated in either the language of S. 56 or by general considerations.

LACHMI CHAND *v.* LACHHO, I L R 49 All. 334.

Three views are possible as regards the effect of surrender by a widow after alienation: (*i*) The surrender sweeps away the alienation. (*ii*) It is not competent to her to surrender after having alienated the properties. (*iii*) The surrender is subject to the alienations made, that is to say that they are good for her life-time.

Mr. Justice Page of the Calcutta High Court thought that the first was the right conclusion and on principle Mr. Justice Sulaiman feels inclined to that view but having regard to the trend of authorities he held the contrary. Boys, J., was in agreement with the general course of decisions. Mr. Justice Kumaraswami Sastri who took this view in *Vaidyanatha Sastri* v. *Savithri Ammal* (1) based the conclusion on the fact that surrender is more or less a creature of judicial decisions and that it is open to Courts to impose conditions on its validity so as not to affect previous alienations. It might be open to comment that this line of argument is not applicable to gratuitous alienations but as gratuitous alienees might have made subsequent alienations for value, any such distinction would lead to further subtleties very much to be deprecated in an already over-complicated branch of law, thanks very largely to judicial decisions.

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1. (1917) I L R 41 M 75 : 33 M L J 387 (F.B).

BHUBAN MOHAN SINHA *v.* RAM GOBINDA GOSWAMI, I L R 54 C. 179.

The learned Judges have held in this case that the payment of interest by a purchaser of the equity of redemption will save time not only against himself but also against the mortgagor under S. 20 of the Limitation Act. The point is fairly well settled in this country and in England where after the decision of the Court of Appeal in *Lacey In re, Howard* v. *Lightfoot* (1), the question is no longer open to doubt. It must be noticed, in this connection, that the language of S. 19 of the Indian Limitation Act regarding the person by whom the acknowledgment has to be made for the purpose of enlarging time is more restricted in its scope than that of S. 20 (1) relating to the payment of interest. It may be mentioned here that so far as the English Law is concerned, no difference has been recognised between the persons by whom an acknowledgment can be made and those by whom a payment of interest can be made for the purpose of saving limitation. See *Read* v. *Price* (2). Coming to the expression used in S. 20 (1) "the person liable to pay the debt, etc.," it is substantially the same as the words used in the English statute regarding acknowledgments which are "the person by whom the same shall be payable" in S. 8 of the Real Property Limitation Act of 1874. That both the expressions have the same meaning was laid down by Farwell, L. J., in *Lacey In re, Howard* v. *Lightfoot* (3). Again the expression "by whom the same was payable" has been held to be one of extended signification not merely denoting the persons who are legally bound by contract to pay the interest, but all persons against whom the payment may be enforced by any action or suit and by whom interest may be payable as in a redemption suit. See *Bolding* v. *Lane* (4). To the same effect were the observations of Buckley, L. J., as he then was, in *Lacey In re, Howard* v. *Lightfoot* (5) where the learned L. J. observes after referring to *Roddam* v. *Morley* (6) that it refers to all others as well who could be reached for the payment and the case before the Court of Appeal was one where the payment of interest by a devisee of the charged property was held to save time even against devisees of uncharged properties. So, seen from every point of view, the conclusion of the

1. (1907) 1 Ch 330.
2. (1909) 2 K B 724 (C. A.).
3. (1907) 1 Ch 330 at 345.
4. (1863) 1 De J & S 133.
5. (1907) 1 Ch 330 at 354.
6. (1857) 1 De G & J 1.

learned Judges in the case under notice is the only one possible in the law. We would in this connection draw attention to a very thoughtful article considering all the aspects of the question in 32 M L J 1 (Journal) and continued in 34 M L J 31 (Journal) where all the English and Indian statutes and decisions are reviewed and discussed.

GANESH TAVANAPPA *v.* TATYA BHARMAPPA, I L R 51 B. 236.

The learned Judges have held in this case that when a plaint is filed in an inferior Court by undervaluing the claim and paying a deficient court-fee and on objection raised by the defendant it is found that an insufficient court-fee has been paid and that if the suit is properly valued and proper court-fee is paid, the suit will have to go before a higher Court, the inferior Court has no jurisdiction to call for the additional court-fee or dismiss the suit under S. 10 of the Court-Fees Act and that its only power is to return the plaint for presentation to the proper Court. Notwithstanding the full consideration which the question has received by the learned Judges, we are not clear that their conclusion is more acceptable than that laid down in the observations in *Kandasami Goundan* v. *Subbai Goundan* (1) though it must be admitted that it does not appear that the question was considered in the latter case with reference to the provisions of the Court-Fees Act. It seems that on a close reading of Ss. 6, 9, 10 and 28 of the Court-Fees Act, the better view is that adopted by the single Judge in the Madras case. When a plaint is sought to be filed in a court, S. 6 requires that the proper court-fee must be paid on it before it can be filed by the court. If, however, the court files it by mistake or inadvertence, the judge may order under S. 28 that it should be stamped as required by law. If the court has reason to think that the market value or the nett profits on which the fee has been paid has been wrongly estimated, the court to which the plaint is presented is empowered under S. 9 to investigate into the question. If as a result of the investigation, such court finds that the amount has been wrongly stated in the plaint, the court which made the investigation and to which the plaint was presented is empowered to call for the additional court-fee payable thereon within a time to be fixed

1. (1923) 46 M L J 345.

by it and on the failure of the plaintiff to pay the same, it is provided by S. 10 that the suit shall be dismissed. We venture to submit that the action contemplated all along the process is that of the court to which the plaint is presented for filing which is referred to as "the court" in both Ss. 9 and 10. If so, it seems clear that the dismissal contemplated is by that court under sub-section II of S. 10. There is nothing to warrant the reading in of words "having jurisdiction to try the suit" into any one of the sections referred to. If, as a result of the proper valuation being placed on the suit, it turns out to be beyond the pecuniary limits of the receiving court, it has always the power and is under a duty to return the plaint for presentation to the proper court and the party would lose nothing as the court-fee would be given credit for in the proper court as laid down in *Visweswara Sarma* v. *Nair* (1) and *Prabhakar Bhat* v. *Vishwambhar Pandit* (2). After all, the whole question reduces itself to the consideration as to the court which has to collect the fee due to the crown on the plaint and the scheme of the Act points to its being the court receiving the plaint originally having the power to collect it. There seems to be no hardship or inconsistency with the provisions of the Civil Procedure Code, in construing the provisions of the Court-Fees Act according to their apparent tenor.

KRISHNAMURTHI *v.* KRISHNAMURTHI, I L R 50 M. 508 : 53 M L J 57 (P C).

This is a case of the very highest importance: It settles a point which has been the subject of several Full Bench judgments. The question is as to how far arrangements made with the concurrence of the natural father of an adopted son prior to adoption are binding on him. The conclusions arrived at by their Lordships may be summarised as follows: If the arrangements take the form of dispositions *inter vivos* before the adoption and are made by the adoptive father they are absolutely binding and apart from any concurrence on the part of the natural father. Similarly even if the dispositions are by will, if the adoption by the widow is by force of the authority given in the will, the dispositions are equally binding because the dispositions take effect before the adoption. There too

1. (1911) I L R 35 M 567 : 21 M L J 533 (F B). 2. (1884) I L R 8 B 313.

the consent of the natural father is immaterial. Arrangements by adoptive father by means of a will which would come into effect only after adoption (the adoption being by himself during his life-time) or arrangements entered into by the widow when adopting a boy would be binding:

(i) If the arrangement is for making provision for the widow during her life-time even though the interest of the adopted son is postponed till after the life-time of the widow;

(ii) and if it has the assent of the natural father to it, such assent being regarded as evidence of its reasonableness. If the arrangements involve the creating of absolute rights in the widow or in strangers, the arrangement would not bind the adopted son though it may have been assented to by the natural father and might otherwise be reasonable or proper.

Arrangements by will are somewhat of an anomaly for the obvious reason that they can be revoked by the testator but they seem to be valid according to their Lordships if they are designed for the limited purpose indicated above. As the whole thing seems to be supported on the basis of custom, the question as to how it would fit in with the general theory as to the incapacity to make wills becomes immaterial.

We have had a somewhat similar divergence of view as to the legal possibility of the karnavan renouncing his position as karnavan the doubts finally being resolved in favour of the existence of such power. Here it has been the other way about.

SRI THAKURJI *v.* JAIKALI KUNWAR, I L R 49 All. 329.

Difference between slow erosion and accession to another estate on the one side and violent carrying away of a portion of the estate and reformation *in situ* is very well recognised. While in the one case the owner loses his rights in the other he regains his as soon as the land re-appears.

NINGAPPA MARBASAPPA *v.* GYANAJI POMAJI, I L R 51 Bom. 231 AND LAKHMIDAS AND CO. *v.* SIR D. J. TATA, I L R 51 Bom. 247.

After the enactment of Act II of 1927 by the Indian Legislature which was intended to nullify the decision of the Privy Council in *Dayal Singh* v. *Indar Singh*(1) the confusion caused by that decision is at an end and if the case under notice came up later, it would not have been necessary to consider or specify the limits of the rule laid down by the Privy Council in that decision. It will also serve no useful purpose to bring out the fallacy underlying it. No doubt as the learned Judges were constrained to do in *Ningappa Marbasappa* v. *Gyanaji Pomaji* (2), if the decision of the Privy Council had stood by itself, the Courts in India would be bound to follow it whatever their own view on the question may be. There can be no doubt that the enactment is retrospective in its operation, by reason of its express provisions and its remedial character, if not also because it affects procedure as its effect is to affect documents being given in evidence under S. 49 of the Registration Act. It would still be a question how far the retrospectivity will affect the final decisions given before the amendment of the Registration Act. Compare *Guardians of Bath Union* v. *Guardians of Berwick-upon-Tweed Union* (3).

VEERABHADRAYA *v.* ZAMINDARS OF VALLUR, I L R 50 M. 201 : 52 M L J 38.

Whether land once proved to have been ryoti land can become private land is a question over which opinion seems to be sharply divided; on one side we have Sir John Wallis, C. J. in *Zamindar of Chellapalli* v. *Somayya* (4), Napier, J., in *Zamindar of Nuzvid* v. *Lakshminarayana* (5) and Spencer, J., on the other we have Mr. Justice Seshagiri Aiyar in *Zamindar of Chellapalli* v. *Somayya* (4), Mr. Justice Sadasiva Aiyar in *Zamindar of Nuzvid* v. *Lakshminarayana* (5) and Abdur Rahim and Burn, JJ., in *Sreemantha Raja Yarlagadda Mallikarjuna Prasada Naidu* v. *Subbiah* (6). In this Mr. Justice Krishnan and Mr. Justice Venkatasubba Rao throw in their weight with the former. Whether the one view is right or the other, there is no question that there can be no such conversion

1. (1926) L R 53 I A 214 · 51 M L J 788 (P C).
2. (1926) I L R 51 B 231.
3. (1892) 1 Q B 731 at 734.
4. (1914) I L R 39 M 341: 27 M L J 718.
5. (1921) I L R 45 M 39· 42 M L J 161.
6. (1919) 39 M L J 277.

after 1st July, 1898. That seems to be common ground. In S. 185 the Legislature has clearly indicated that evidence of letting as private land after that date is of no avail for showing that the land is private land; in other words, the dealing if it all to be effective, must be before that date. The Judges that hold the view that there cannot be such conversion at all rely mainly on the indication afforded by this section and S. 8 which enacts that whenever before or after the Act the entire interests of the land-holder and the occupancy ryot have become united in one person such person shall have no right to hold the land as a ryot but shall hold it as landholder. The reply given on the other side is that even private land is held by the landholder as such and not as a ryot. The only restriction recognised on other side is that indicated by S. 185. But for S. 185, their Lordships would have been prepared to hold one should fancy, that the conversion could have taken place even after the Act. The Act is so badly drafted that it is impossible to say what the Legislature had in mind when enacting this or that section and it is hoped that the matter will be made clear when the work of revision of the statute is taken up.

The difference between ryoti land and private land is that while letting out is the mode of enjoyment of the former, private cultivation is the mode of enjoyment of the latter, letting being only temporary. While there is so much difference of opinion as to the possibility of conversion of ryoti land into private there is none as regards the legal possibility of the reverse process. When the reverse is set up, it is open, according to their Lordships, to rebut the contention by producing leases subsequent to 1908 that show clear indication of an intention to retain the old character. Whether protestations to the contrary notwithstanding, land which has been for considerable period of time let to tenants without any disclosed or provable intention of resuming private cultivation should not be regarded as having shed its original character of private land, is a question which might have but has not been raised.

RAMAN CHETTIAR *v.* TIRUGNANA SAMBANDAM, I L R 50 M 217 : 51 M L J 869.

While noticing *Nallaka Venkatasami* v. *Rajam Viranna*(1) we pointed out that the decision was not reconcilable with the judgment of the Privy Council in *Gangapershad Sahu* v. *Maha-*

1. (1921) I L R 45 M 429 · 42 M L J 333.

rani Bibi (2) and that is the view which the Bench in this case takes. The alienee is entitled to act upon the sanction by a competent Court unless of course he was himself guilty of fraud or underhand dealing. If he was himself aware of very relevant circumstances which to his knowledge have not been placed before the Court the sort of fraud upon the Court to which Garth, C. J., refers in *Sikher Chund* v. *Dulputty Singh* (3), whether the minor could avoid the sale is doubtful.

VIBUDHAPRIYA THIRTHA SWAMIAR *v.* LAKSHMINDRA THIRTHA SWAMIAR, I L R 50 Mad. 497 : 53 M L J 196 (P C).

It is usual for the Pariyaya Mutt at Udipi to feed the Brahmin pilgrims visiting the place and this process sometimes involves borrowing. Krishnan and Ramesam, JJ., ruled that such feeding was not compulsory, and that it was the duty of the Matadhipathis to keep within the limits of their available income and that the lender had no right to proceed against the succeeding head for the debt. While not disagreeing from the learned Judges that feeding might not be compulsory in the sense they could not stop it, seeing that they could not do so without violence to popular sentiment their Lordships upheld the borrowing. Say their Lordships "what their Lordships have to see in this case is, firstly, whether the debts were contracted by the deceased Swami for his own purposes or for the purposes of the temple and in discharge of the duties under which he lay in the performance of the worship and feeding of pilgrims and secondly, whether the moneys borrowed were legitimately applied for those purposes." The decision cannot be said to have laid down any new principle but their Lordships substitute for the strict cast iron sort of rule laid down by the learned Judges a somewhat elastic and less rigid rule. The test is not whether the Swami was bound to act in the manner he did—the question rather is whether it was proper for him to have so acted—a rule which is applied in the case of minors. Guardians occasionally borrow for the marriage of the minors. If the test applied by the learned Judges to Mutts were applied to such borrowings the borrowing could under almost no circumstances be justified. What one may call the *necessary* expenditure at a marriage could not come to more than a few rupees. The rest is customary expenditure, expenditure which ordinary people consider properly incurred in connection with marriage. Their Lordships dissent from the criticism of

2. (1884) I L R 11 C 379 (P C).
3. (1879) I L R 5 C 363.

Justice Ramesam on reliance upon custom or ancient practice as justification for the course adopted by the Swami.

A portion of the borrowing in the case was for re-building the dining hall connected with the Krishna Temple. The learned Judges were very meticulous as to the comparative size of the old and new buildings and disallowed the expenditure on the ground that though the rebuilding might be necessary, enlarging the building could not be considered a necessity. This aspect of the case did not appeal to their Lordships, very rightly we should think. If rebuilding was a necessity, the mere fact that the new buildings were slightly bigger than the old or more substantial than the old could not affect the question. It is possible of course to be culpably extravagant but short of that, to meticulously weigh the old and the new proportions is, we think, as their Lordships apparently hold, not justifiable

Their Lordships direct however that the decree should be against only the incomes of the Mutt. Though as early as *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1) their Lordships adopted this course and in *Srimath Daivasikamani Pandara Sannadhi* v. *Noor Mahomed Rowthen* (2) that kind of decree was passed and in *Nallayappa Pillai* v. *Ambalavana Pandara Sannadhi* (3) Mr. Justice Subramania Aiyar specially emphasised that that is the only sort of the decree that can ordinarily be passed. A somewhat discordant note was struck in *Sreemath Daivasikamani Pandara Sannadhi* v. *Palaniappa Chetty* (4) and it is gratifying to find the Privy Council emphasising that that is the decree that should be passed both in this case and in *Niladri Sahu* v. *Mahant Chaturbhuj Das* (5). Their Lordships pass a decree in these terms "The Trial Court should appoint a Receiver for the rents and issues of the Mutt proper and the proceeds from offerings, etc., and after payment of the expenses connected with the Mutt and the performance of the ceremonies and festivals and a reasonable provision for the maintenance of the Matadhipathi, the balance should be applied in discharge of the plaint debt". On the one side, it provides sufficient check on prospective lenders and on the other it affords reasonable protection for honest creditors who if their claims are reasonable have a not unremote chance of realising their dues.

1. (1875) L R 2 I. A 145. 2. (1907) I L R 31 M 47: 17 M L J 553
3. (1903) I L R 27 M 465 at 472: 14 M L J 81 (F B).
4. (1910) I L R 34 M 535 : 20 M L J 969.
5. (1926) I L R 6 Pat. 139 · 51 M L J 822 (P C).

ARUNACHELLAM *v.* DAVID, I L R 50 M 239 : 51 M L J 671.

The distinction made in this case between a completed act and a threatened act restricting the operation of S. 80, C. P. C., to cases of completed acts can no longer be sustained in view of the latest pronouncement of the Privy Council in *Bhagchand Dagadusa* v. *Secretary of State for India* (1).

MAHOMED KASSIM & CO. *v.* SEENI PAKIR BIN AHMED, I L R 50 M. 261 : 52 M L J 240 (F. B.).

There are two clauses of S. 13, Civil Procedure Code; one says that a foreign judgment which is not passed on the merits cannot be sued upon; another that a judgment which is opposed to natural justice cannot. A judgment passed on default of appearance by the defendant without any evidence being taken, it was contended in this case, came within the first clause and accordingly could not be sued upon and the Full Bench upheld the contention overruling *Janoo Hassan* v. *Mahamad Ohuthu* (2). In England, such a judgment can apparently be sued upon. Here in India, the first clause above referred to has been held by the Privy Council in *Keymer* v. *Viswanatham Reddi* (3) and *Oppenheim and Co.* v. *Mahomed Haneef* (4) to bar suits upon such judgments. The distinction made in *Janoo Hassan* v. *Mahamad Ohuthu* (2) between a case where the defendant might have if he pleased set up a defence and the case where the defence was made and was struck out was not accepted by the Full Bench. If without notice at all, the decree is passed, then it would offend the next clause, that is to say, it would be against natural justice as some judgments *in absentia* of the French Courts under French Procedure have been held to be. Mr. Justice Venkatasubba Rao is of opinion that whether the decree is passed *ex parte* after taking evidence or without, the result is the same. Here Mr. Justice Krishnan does not agree with him. We should think that a judgment rendered on evidence produced by the plaintiff though no doubt in the absence of the defendant owing to the latter's default, cannot be said to be not delivered on the merits of the case. It may be a decision rendered after an inadequate trial but it cannot be said to be a decision not on the merits at all.

1. (1927) P C 176 : 53 M L J 81 (P C).
2. (1924) I L R 47 M 877 : 47 M L J 356.
3. (1916) I L R 40 M 112 : 32 M L J 35 (P C).
4. (1922) I L R 45 M 496 ; 43 M L J 422 (P C).

SOGAIMUTHU PADAYACHI *v.* KING-EMPEROR, I L R 50 M 274.

One question that arose in this case was as to the admissibility of a statement of the accused that he buried the *stolen* property somewhere when he himself points out the property. On this point all the three Judges seem to be agreed that the whole statement is admissible and could be used to show both that the property is stolen property and that it was buried by him. S.27 says: "Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police Officer so much of such information whether it amounts to a confession or not as relates distinctly to the fact thereby discovered may be proved." It is obvious from the language of the section that the whole information that precedes or leads to the discovery is not admissible but only so much "as relates distinctly to the fact thereby discovered". To start with, something must be discovered by the statement. When the accused himself produces a thing after making the statement, can it be said that it is a discovery by reason of the statement. The discovery is his own act and not necessarily connected with the statement. That apparently is the view taken in an earlier case in Criminal Law Journal referred to in the judgment of Mr. Justice Devadoss. But any act of the Police intervening between the statement and the finding would be sufficient to make it a discovery. Their asking the accused to produce it and his producing it for instance would make it a discovery by the Police so that we agree that there is not much point in the distinction made unless it could be said in any particular case that the whole thing, the statement and the production is a voluntary act of the accused without any persuasion or pressure from the Police a somewhat rare and improbable event.

As regards the portions of the statement that would be admissible also there is some difference of opinion. It is a bad state of affairs that the admissibility of a statement should depend upon the construction of the sentence uttered. For instance, if the statement ran thus: "I shot the man with a revolver and I have hidden the revolver in the dungheap" the statement may not be admissible as to shooting, but if he said "The revolver with which I shot the man is here" the whole statement would be admissible. The construction of the sentence in the vernacular is so often different from that in English

and the exact words uttered by the accused are difficult to be reproduced. A more satisfactory rule is desirable. The important question on which the Judges differed in this case was as to whether the possession of certain properties alleged to have been stolen from the mutt by the deceased and admitted by them to be *stolen* property was sufficient evidence to find them guilty of murder. It cannot be said that there was much difference between the Judges as to the principle of law applicable. The question was more of appreciation of evidence. The ultimate conclusion of Mr. Justice Spencer was that there is nothing to show that the murder and the theft were parts of the same transaction and that in the absence of such evidence possession of stolen goods would not be evidence of murder. Possession of stolen goods unaccounted for might be evidence of theft or receipt of stolen property but the inference of murder from such possession even if murder and theft are parts of the same transaction is somewhat violent and though there is nothing in the Evidence Act to restrict the Court to any particular kind of evidence one can well appreciate the hesitation shown by the learned Judges in basing any conclusion as to murder on such possession.

KANNAN *v.* AVVULLA HAJI, I L R 50 M. 403 : 52 M L J 1.

On the question as to whether there can be a step-in-aid of execution when there is no pending application for execution, conflict seems to be thickening. On the one side we have this case and *Sankara Nainar Pillai* v. *Puthiya Veettil Thangamma* (1) and C. M. A. No. 120 of 1923; on the other we have *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (2) (Ayling and Venkatasubba Rao, JJ.) and C. M. S. A. No. 170 of 1925 (Wallace and Thiruvenkata Achariyar, JJ.). We must confess, we prefer the view taken in the former set of cases.

The other point in this case was as to whether an application for delivery of possession by a decree-holder-purchaser under O. 21, R. 95 is a step-in-aid of execution of the decree. The argument of the Allahabad High Court in *Moti Lal* v. *Makund Singh* (3) on this matter proceeds thus: Taking possession is as much a step-in-aid of execution as taking out

1. (1921) I L R 45 M 202 : 41 M L J 374.
2. (1921) I L R 45 M 466 : 42 M L J 303.
3. (1897) I L R 19 A 477.

the sale-proceeds. If the latter is a step-in-aid, why not the former? The Calcutta High Court, curiously enough, does not accept the position that taking out money is a step-in-aid but on the point in question seems to agree with the High Court of Allahabad in *Sariatoolla* v. *Raj Kumar Roy* (4). They argue that a step-in-aid of execution may be as much in aid of an execution that has taken place as in aid of an execution that has to take place. The Madras High Court has been of opinion that both application to take out the sale-proceeds and application for delivery of possession are steps-in-aid which seems to be a logically consistent position. As regards the former, the argument of the Punjab as well as the Calcutta Courts is there would be no limitation for the decree-holder applying to take out money and is the decree to be revived by such applications at any time? But that is overlooking that the decree is to be kept alive by some application within 3 years and a barred application cannot be revived by a step-in-aid taken more than 3 years after the last starting point. Once barred, the decree is ever barred. The criticism is also open to the comment made in *Koormayya* v. *Krishnamma Naidu*(5) that in deciding whether any particular act is or is not a step-in-aid of execution, it is the nature of the act that must be looked to and not the time at which it may possibly be done. Another argument is that the order made would not be a judicial order or order that can be refused. This argument is not available in the case of an order for possession which would be a decree and an appeal and a Second Appeal will lie from it. There is this difference between the old C. P. C. and the new that whereas under the old Code, S. 315, the purchaser has a right to get the money back, when he is deprived of the property by reason of want of title, there is no such right under the new Code. The view taken in the cases above referred to that there must be a pending execution application before you can talk of an application to take a step-in-aid would, if finally accepted, considerably offset the beneficial effect of the decision.

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4. (1900) I L R 27 C 709.

5. (1893) I L R 17 M 165 : 3 M L J 296.

RAMSARAN MANDAR *v.* MAHABIR SAHU, I L R 6 Pat. 323: 52 M L J 402 : 54 I A 55 (P. C.).

This judgment of the Privy Council is a technical one based on the form of the pleadings in the case. The suit was framed as an ordinary suit for specific performance of an agreement to sell, with an alternative claim for damages for breach thereof, such damages being assessed at the amount of the earnest money paid, with interest thereon. The junior members of the joint family were also added as parties to the suit but there was no allegation or proof that the agreement to sell the family land was for the necessity or benefit of the family. The father having died in the course of the proceedings, the sons and grandsons who were already parties to the suit were also recorded as legal representatives. Their Lordships held, in the circumstances that, the decree for return of the earnest money against the sons and grandsons cannot be sustained *in law*. Their Lordships point out that the suit is not one for "money had and received" or for recovery of a debt. The claim for return of the purchase money paid as earnest is not strictly speaking a claim for damages. Under S. 54, cl. 6 (*b*) of the Transfer of Property Act, the purchaser will even have a charge on the property as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest, for the amount of the purchase money properly paid by him in anticipation of the delivery of the property and for interest on such amount. It may be a different question whether the statutory charge is operative in the facts of the particular case, as the Bengal school of the Mitakshara Law does not permit a coparcener in a joint Hindu family to alienate even his undivided share. The judgment under notice is really based on the view that the nature and character of an action for return of purchase money with interest thereon is different from an ordinary action for damages for breach of an agreement to sell. Their Lordships point out that there was no amendment of the suit as originally framed even after the death of the original contracting party nor could such an amendment be ordinarily permitted as it would change the *nature* of the suit. It was not possible either, to support the decree against the sons and grandsons on the basis of the Hindu Law doctrine of pious obligation to pay the debts of the father which are neither illegal nor immoral. Even that basis of relief will be one altering the nature of the suit and besides the parties must have had an opportunity to rebut such new cause of action. It may also be noted that the

Privy Council dismissed the suit altogether, on the above view of the pleadings, notwithstanding the fact that the plaint also contained a general prayer for such other relief as the plaintiff may be entitled to on the facts found. The decision, however, is not an authority for holding that the plaintiff cannot claim in the same suit a relief for damages for breach of contract against the father and for return of purchase money against the father and sons on the basis of "money had and received" and on the liability of a Hindu son based on the doctrine of pious obligation. A comprehensive suit with the necessary allegations both against father and son can be framed so as not to offend against the rules relating to joinder of causes of action.

MA THAUNG *v.* MA THAN, I. L. R. 5 Rang. 175 : 47 M L J 618 : 51 I A 1 (P C).

The rights of parties in the above case depended upon the question whether there was a partition between a father and his children. A document which was in form a deed of partnership between the father and his children was in reality held by their Lordships to be a record of a division of rights and interests. S. 92 of the Indian Evidence Act was held by the High Court not to stand in the way of oral evidence being permitted to show that it was really a partition arrangement which was put in the form of a deed of partnership, both because the evidence was let in by a third person not a party to the document in question and also because what was attempted to be proved *aliunde* was not a variation or contradiction of the terms of the document. The Privy Council also holds that while subsequent conduct of the parties to a contract reduced into writing is not admissible to vary or alter it, such conduct is admissible in evidence to explain or elucidate a contract open to different meanings. The distinction is real and noteworthy As observed by Sir Lawrence Jenkins in *Baijnath Singh* v. *Mahomed Hajee Abba* (1) S. 92 "does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances". On a review of the evidence and on the terms of the document, the Judicial Committee held that the document *evidenced* a partition between the parties thereto.

1. (1924) 48 M L J 339 (P C).

MUNICIPAL CORPORATION OF RANGOON *v.* THE SOORATEE BARA BAZAR CO., LTD., I L R 5 Rang. 212.

This is an instructive judgment as regards the validity of a bye-law made by a Municipal corporation under its statutory powers. It is now well settled that it is a general principle of construction that the sanction of Government does not render the bye-laws immune from the control of Courts as to their validity. Even if under the statute itself, the bye-laws when made are to have the same effect as if they were contained in the Act, there will be a difference between an enactment and a rule as regards the relative importance of the two in cases of conflict between them. There can, however, be no doubt of the Court's jurisdiction to declare the invalidity of a bye-law where the statute requires the bye-laws as in the generality of cases, not to be inconsistent with the provisions of the Act.

The general test as regards the validity of a bye-law is "its reasonableness." Bye-laws have frequently been declared to be *ultra vires* on the ground of unreasonableness if they are found to be partial and unequal in their incidence as between different classes, if they are manifestly unjust, if they disclose bad faith, if they involve such personal interference with the rights of those subject to them as no reasonable person could justify. It may also be noted that the Courts adopt a more benignant construction as regards the reasonableness of bye-laws made by Municipal and Local Government bodies or Government departments functioning merely for the control and well-being of the public than in the case of bye-laws made by corporations engaged primarily as traders as, for instance, Railway Companies. It has been stated that in the case of public bodies "credit ought to be given to those who have to administer the bye-laws that they will be reasonably administered" see *Slattery* v. *Naylor* (1) and *Kruse* v. *Johnson*(2). In the particular case, the Rangoon Council made a bye-law with the sanction of the Local Government imposing an oppressive and prohibitive fee for the issue of a license for the holding of a private market and it was rightly held that the rule levying a high licensing fee was in reality a rule imposing an unauthorised tax and *ultra vires* of the powers conferred on the Council.

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1. (1888) 13 A C 446.
2. (1898) 2 Q B 91.

SATYANARAYANA *v.* SEETHAYYA, I L R 50 Mad. 417 : 52 M L J 396.

The question as to how far suspension of limitation can be recognised apart from the sections of the Limitation Act has been the subject of many decisions and opinion has been fairly precipitating to the conclusion that it cannot. That is the opinion expressed by the majority of the Full Bench in *Muthu Korakkai Chetty* v. *Madar Ammal* (1) though on their view as to the facts of the particular case it was unnecessary to return an opinion on the question referred. The basis of the judgment in *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (2), according to that opinion, is to be found in S. 14 of the Limitation Act liberally interpreted. In partition actions, the defendant is in the same position as a plaintiff and the period during which he is actually pressing his claim and especially the time that intervenes between the passing of a decree in his favour and the cancellation of the same could legitimately be deducted under S. 14. The majority of the Judges are however for liberally interpreting wherever possible the starting point of limitation in the third column by dating the cause of action from a date when the litigation as regards the subject-matter is ended. Where it is not possible so to interpret the Article, the party is without relief. In this case, there was only a suit for a declaration that a pro-note has no consideration and was vitiated by fraud, etc. There was no means of interpreting the Article of limitation applicable, *viz.*, Art. 73, so as to give effect to the principle for the limitation starts under that Article from the date of the pro-note. There was the further circumstance that there was no impediment to the plaintiff suing on the pro-note during the pendency of the suit. The latest decision of the House of Lords holding that the fact that a person was declared a lunatic and was treated and confined as such would not suspend limitation against the public officer who was responsible for such confinement, etc. *Harnett* v. *Fisher* (3) shows that no such general equitable principle as was sought to be evolved by Mr. Justice Sadasiva Aiyar in the Full Bench Case in *Muthu Korakki Chetty* v. *Madar Ammal* (1) and certain other Judges is recognised.

1. (1919) I L R 43 M 185 · 38 M L J 1 (F B).
2. (1916) I L R 43 C 660 : 30 M L J 529 (P C).
3. (1927) A C 574.

BAI JIVI v. NARSINGH LALBHAI, I L R 51 Bom. 329.

This decision raises once more the question as to the defences open in a suit for restitution of conjugal rights between Hindus. The answer to the question depends largely on the basis of the claim in such a suit. The learned Judges seem to suggest that the origin of the action was one borrowed from the old ecclesiastical courts in England which administered the canon law between the husband and wife. That canon law as such has no binding force between Hindus can readily be conceded and what really applies between Hindus in the regulation of marital relations is the Hindu Law. Indeed, this was laid down most clearly in *Moonshee Busloor Ruheem* v. *Shumsoonnissa Begum* and *Jodonath Bose* v. *Shumsoonnissa Begum* (1) by the Privy Council half a century ago, where their Lordships held that in actions for restitution of conjugal rights between Mahomedans it is the Mahomedan Law that applies. After the decision in *Binda* v. *Kaunsilia* (2), where Mahmood, J., examined the question in all its fullness, it is no longer open to doubt that restitution of conjugal rights was not unknown to Hindu Law and that in such an action it is the rules of Hindu Law that are enforced. As often happens in enforcing the rules of Hindu Law, it is not easy to disentangle and distinguish rules of law from moral and spiritual injunctions. The right under the Hindu Law Texts of one spouse to the company of the other and of the exercise of the marital rights have been held to be legal and not merely moral or spiritual injunctions and the courts can therefore give effect to them in an action for the restitution of conjugal rights. In this connection we may submit that a suit for the restitution of conjugal rights cannot easily be assimilated to one for specific performance. Whatever justification there was in the Mahomedan Law under which marriage has many elements of a contract as observed in *Moonshee Busloor Ruheem* v. *Shumsoonnissa Begum* and *Jodonath Bose* v *Shumsoonnissa Begum* (1) there seems to be no basis for it in the case of a Hindu marriage which is a *samskara* or sacrament. Consequently what are enforced by the Court in a suit for restitution of conjugal rights are the rights and obligations flowing out of the relation of husband and wife under the Hindu Law Texts. The contract to marry having resulted in a marriage, it is not easy to see whether there is any scope for

1. (1867) 11 M I A 551. 2. (1890) I L R 13 A 126.

a suit for specific performance. Once the nature of the suit is clearly understood that it is one to enforce the obligations flowing out of the married status under Hindu Law, it is necessary to consider what under Hindu Law are the defences to a suit for restitution. Mr. Justice Mahmood has referred in the above case to the obligation of the husband not to forsake his virtuous wife and also to treat her with kindness and affection. It may be open to question whether the failure of the husband to observe these injunctions may not furnish a defence to an action for restitution of conjugal rights. There are, however, the texts which impose on the duty to look upon her husband as divine who is cruel to her and addicted to bad ways. The Hindu Law being thus not clear as to what defences are available, courts have applied the rules of the English law only as rules of justice, equity and good conscience. It therefore follows that the English rule as to "legal cruelty" being the only defence to a suit for the restitution of conjugal rights does not apply to Hindus, in all its rigour. In *Kondal Rayal Reddiar* v. *Ranganayaki Ammal* (3) the learned Judges held that the strict rule of English law on this question should not be applied among Hindus.The Privy Council pointed out in *Moonshee Busloor Ruheem* v. *Shumsoonnissa Begum* and *Jodonath Bose* v. *Shumsoonnissa Begum* (1) that other grounds of defence may be open among Mahomedans. Even in *Dular Koer* v. *Dwarka Nath Misser* (4) and *Babu Ram* v. *Musammat Kokla* (5) grounds other than cruelty have been recognised as defences among Hindus to a suit for restitution of conjugal rights. What those grounds are have not been enunciated anywhere with clearness and definiteness. It may, however, be said that under the decision under notice a husband will not be entitled to restitution of conjugal rights when he deserted his wife for no justifiable cause and the object of the suit was not *bona fide* to resume marital relations but only to defeat her claim for maintenance.

UMED MAL *v.* CHAND MAL, I L R 54 C. 338: 52 M L J 368 (P C).

This being a decision of the highest tribunal will naturally be canvassed earnestly and it is therefore necessary to clearly

1. (1867) 11 M I A 551. 3. (1923) I L R 46 M 791 : 45 M L J 186.
4. (1905) I L R 34 C 971. 5. (1923) I L R 46 A 210.

understand the limits especially as S. 115 has been a fruitful source of conflict of decisions in this country. The properties which formed the subject-matter of the suit were claimed by the plaintiff to have been mortgaged to his predecessors-in-title by the owner and purchased by them in execution of a decree on the mortgage. The plaintiff alleged that the defendant had no title to the property and sought to recover the same from him. It is difficult to follow their Lordships when they say that for the purpose of deciding as between the plaintiff and the defendant whether the suit properties were comprised in the mortgage, the original mortgagor must be a party to the suit. Although any decision as between the plaintiff and the defendant whether the properties were included in the mortgage or not will not bind the mortgagor, it is not easy to see how the mortgagor is a necessary party to the suit between two different persons. Any expressions which fell from their Lordships on this question cannot be understood to have any general application, as their Lordships have clearly restricted themselves to the particular circumstances of the case, though it is by no means clear what the circumstances are.

On the other question, however, whether a decision of a suit in the absence of the necessary parties to it is a material irregularity in the exercise of jurisdiction within the terms of S. 115 of the Civil Procedure Code this pronouncement of their Lordships in the affirmative will set at rest all doubts on the matter.

SHIBBI *v.* HARDHIAN SINGH, I L R 49 All. 370.

This is an obvious case. The plaintiff who had been party defendant in the suit on the mortgage had been exonerated from the suit on the ground that he set up a hostile title which could not be investigated in the mortgage suit. As against the others the mortgage suit was decreed and the property was sold. The decree-holder himself purchased the property and got symbolic delivery. The present plaintiff then put in a claim under O. 21, R. 100 but the Court rejected the claim on the ground that she had not been dispossessed at all. The present suit was, accordingly, brought for a declaration that she was entitled to the property on the footing that she was in possession or, in the alternative, for possession of the property on the footing that there was a subsequent dispossession, subsequent, that is after the order on the claim petition. In either view S. 47, C. P. Code, could not

be a bar to the suit. Neither of the reliefs was such as could be obtained in execution, and execution also had been completed and had in no way affected the plaintiff. Her present cause of action was one totally unconnected with the execution and based upon an event that happened after the completion of execution. It was as if a holder of a decree for possession obtained possession but was subsequently dispossessed by the defendant. In that case he could not further execute the decree, his only remedy being to sue on the new cause of action furnished by the subsequent dispossession.

SALIK RAM *v.* WALI AHMED, I L R 49 All. 388.

Whatever the difference of opinion as regards precise effect of party offering to take an oath withdrawing without good reason, there is none whatsoever as to the conclusive effect of the oath taken in accordance with the agreement, even though the party agreeing to be bound resiles from the agreement. Equally the Courts are agreed that upon good cause shown the party agreeing to be bound may be permitted to withdraw from the agreement. It is somewhat difficult to formulate the grounds for which the party may be allowed to withdraw.

THE SOUTH INDIA INDUSTRIALS *v.* NARASIMHA RAO, I L R 50 M 372 : 52 M L J 199.

The decision is an equitable one but it is difficult to reconcile it with S. 22, Limitation Act or O. I, R. 10, Civil Procedure Code, cl. (5). The general principle no doubt is that the Court adjudicates on the state of the affairs at the date of the plaint or application. It is on this principle that limitation is prescribed for applications and suits and not to orders. But S. 22 seems to go out of the way and date limitation as on the date when the defendant was made a party. This is in plain contravention of the general theory but the difficulty lies in reconciling the wording of S. 22 with the application of the general theory to this case also.

MATHURA KURMI *v.* JAGDEO SINGH, I L R 49 All. 405.

Here the point that arose for decision was the ever-recurring point as to the legal effect of a sale-deed and an agreement to reconvey, whether it was a sale or a mortgage. The feather that turned the scale in this case was the fact that no outer time limit was fixed for paying the money and getting the reconveyance. In the language of the Privy Council in *Narasingerji* v. *Parthasaradhi Rayanam Garu* (1) "clearly, therefore, and within the intendment of the documents themselves, time is not of the essence in this matter; so soon as that is established all pretence for holding this ostensible sale and re-purchase to be anything else than a mortgage by conditional sale disappears". There can be a lawful agreement to sell without a time limit but it is the essence of the agreement to reconvey that after the time limit has expired, the party in default has not the right to demand a reconveyance and if this essential element is lacking, the inference that it is a mortgage almost inevitably arises upon the facts.

The angle of vision with regard to these documents has completely changed since *Narasingerji* v. *Parthasaradhi Rayanam Garu* (1). Their Lordships' disinclination to accept the course of decisions in this country based upon *Balkishen Das* v. *W. F. Legge* (2) as correct without more discussion is more or less regarded as amounting to a disapproval of them. This view receives considerable support from the reasoning of their Lordships in *Baijnath Singh* v. *Mahomed Hajee Abba* (3). Their Lordships say thus: "It is true as laid down in *Balkishen Das* v. *Legge* (2) that under S. 92 of the Indian Evidence Act as between the parties to an instrument, oral evidence of intention is not admissible for the purpose, either of construing deeds or of proving the intention of the parties. But in the view their Lordships take of the circumstances of this section, the section and the ruling have no application to it. The preamble to the Evidence Act recites that it is expedient to consolidate, define and amend the law of evidence and S. 92 merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances." This is more or less getting rid of *Balkishen Das* v. *Legge* (2). Their

1. (1924) I L R 47 M 729 . 47 M L J 809 (P C).
2. (1899) L R 27 I A 58 · I L R 22 A 149 (P C).
3. (1924) 48 M L J 339 (P C).

Lordships' dicta cannot mean that the Court can come to the conclusion on the effect of the transaction on materials not permissible under the law to be used. Apparently what their Lordships mean is that a document which having regard to the course of business in this country, is an equivocal transaction, may be assigned its true legal character by reference to the surrounding circumstances.

RAJAH BRAHASUNDAR DEB *v.* BHABAN SAHU, I L R 6 Pat. 373.

A person who was declared a disqualified proprietor and whose estate was taken charge of by the Court of Wards under Bengal Act (IX of 1879) was sued as a ward of the Court represented by the Manager of the Court of Wards as his guardian. The claim was on the basis of a personal liability arising out of a contract entered into by the ward. On an objection to the framing of the suit, on the ground that the ward must be sued personally and in his own name without the intervention of a guardian *ad litem,* it was decided that the suit was properly framed and was in strict conformity with the provisions of S. 51 of the Court of Wards Act. The fact that the suit was to enforce merely the personal liability of the ward did not affect the question. A similar question will not ordinarily arise in Madras for the reason that under S. 34 of the Madras Court of Wards Act (I of 1902), the ward is not competent to enter into any contract except one of marriage. In Bengal, however, a ward of Court is not disqualified from entering into a contract and although such contracts cannot be enforced against any property of the ward in the possession of the Manager under the Court of Wards, they can be enforced against the ward personally. [See *Dhanipal Das* v. *Maneshar Bakhsh Singh*(1) and *Collector of Benares* v. *Sheo Prasad* (2).]

KUMAR GANGANAND SINGH *v.* MAHARAJAH SIR RAMESHWAR SINGH BAHADUR, I L R 6 Pat. 388.

There are several questions of importance raised and decided in the above case but we wish to draw attention in particular to the discussion relating to the liability of an infant on a contract where it was entered into on the fraudulent representation of the minor that he was of age. The strict common

1. (1906) I L R 28 A 570: 16 M L J 292 (P.C).
2. (1883) I.L R 5 A 487.

law doctrine was that the contract cannot be enforced against the minor even in such a case, although courts of equity in some cases compelled a restitution of goods obtained by the minor. It would be difficult to rely on these equitable principles after the examination of the question by the Court of Appeal in *Leslie Ltd.* v. *Sheill* (1) and by the Privy Council in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (2). Even if any equity can be urged in such a case, it must be established first that there was an express representation by the minor that he was of age. Mere inferences suggested by or drawn from the infant's conduct will be insufficient. In particular the mere execution of a vakalatnama and the filing of a written statement as in this case cannot be regarded as any such representation. As observed by Lush, L. J., in *Ex parte Jones* (3) "An infant cannot by any false pleading or by any mistake in pleading alter his status; his immunity remains notwithstanding". The above dictum which in that case was with reference to the immunity of the infant from being adjudicated a bankrupt is equally applicable to his immunity from liability on a contract.

KING-EMPEROR *v.* NGA SAN HTWA, I L R 5 Rang. 276(F B).

The powers of the Subordinate Magistracy to grant bail to persons accused of non-bailable offence have been extended by the recent amendment to the provisions of S.497 of the Criminal Procedure Code. The Full Bench decision under notice rightly construes the expression "punishable with death or transportation for life" in clause (1) of the section disjunctively as if it ran "punishable with death or punishable with transportation for life". We agree that the decision to the contrary in *Mahomed Eusoof* v. *King-Emperor* (4) and in *Tularam* v. *Emperor* (5) holding that "death or transportation for life" is a single inseparable phrase, is not correct. As regards the further observations by the Full Bench, as to the lines on which Magistrates should exercise their discretion which has been conferred on them by the amended section with reference to the granting of bail for persons accused of non-bailable offences other than those punishable with death or with transportation for life, we do not see why the High Court should attempt to tie the judicial discretion of the magistracy. Nor is it clear

1. (1914) 3 K B 607. 2. (1916) 2 A C 575.
3. (1880) L R 18 Ch. D 109. 4. (1925) I L R 3 Rang. 538.
5. (1926) 97 I C 39.

that the observations of the Full Bench exhaust all the relevant circumstances which the Courts should ordinarily take into consideration in deciding the grant or refusal of bail to accused persons. There seems to be no reason for differentiating between the principles which guide the High Court of session in the exercise of their absolute discretion under S. 498 of the Criminal Procedure Code, and the principles which ought to guide the magistracy in the exercise of *their* discretion under S. 497, cl. (1). It is well established that the important considerations that should be borne in mind are "whether the giving of the bail as opposed to the arrest of the accused might lead to a real danger of his absconding and not appearing to take his trial and whether there is any reason to suppose that he is likely to tamper with the witnesses who would be called against him". As has been observed by the Madras High Court in *The Public Prosecutor* v. *Sanyasayya Naidu* (1) "the Court is not called upon to conduct a preliminary trial of the case and consider the probability of the guilt or innocence of the accused. The Court would be entirely exceeding its function if it did that in any detail".

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1. (1924) 22 L W 156.

KASISWAR RAY *v.* SATYA BHAMA DAS, I L R 54 Cal 374.

This case raises an interesting question as to the forum competent to entertain a review of a judgment. A petition for setting aside an execution sale was dismissed for default by the second Subordinate Judge's Court in a place. At the time when a review of the judgment was asked for, the officer who dismissed the petition for default was placed by the District Judge in charge of the first Subordinate Judge's Court in the same place and the question was whether the same officer when presiding over the first Subordinate Judge's Court can entertain the review application under O. 47, R. 2 of the Civil Procedure Code; and the learned Judges have answered the question in the affirmative. The decision is not of such far-reaching importance as it may appear at first sight, as it depends to a large extent upon the terms of S.13, sub-sections (1) and (2) of the Bengal Civil Courts Act. The enactment provides that every Subordinate Judge has, subject to the notification by the Local Government, jurisdiction over the whole District and the District Judge is given power under sub-section (2) of S. 13 to settle the class of business which each Subordinate Judge is to dispose of and it has been held in *Bachu Koer* v. *Golab Chand* (1) that the District Judge has no power to restrict the local jurisdiction of Subordinate Judges and that it is only the Local Government that has the power to do so. The decision would not have been the same if the question arises, for instance, under the Madras Civil Courts Act, as S. 10 specifically empowers the District Judge to interfere with the local jurisdiction of the Subordinate Judges in the District. Though the decision has thus only a limited application, we venture to submit that the conclusion of the learned Judge is not the only one that can be come to on the question. We are not sure whether in coming to the conclusion the learned Judges kept in view both O. 47, Rr. 1 and 2 of the Code. In the case of a review, R. 1 provides that the application must be made to the Court which passed the original order. R. 2 imposes a further restriction that, in certain cases, it should be not merely to the same court that passed the former order but to the same officer presiding in that court. The necessity for both the essentials to co-

1. (1899) I L R 27 Cal. 272

exist was clearly pointed out in *Ram Baran Chaube* v. *Bhagwati Pandey* (1). If, for instance, in the case under notice, a review was applied for, on the ground of discovery of fresh material evidence, a case falling under the exception to O. 47, R. 2, can the application be made to the second Subordinate Judge's Court who gave the original decision irrespective of the personnel of the Judge. We venture to think the answer must be in the affirmative. The decision of the learned Judges would point to the conclusion that the review petition might in such a case be presented to the first Subordinate Judge. Then, can it be that both the Courts can deal with the review application? Or, may it even be that all the Subordinate Judges in the District have jurisdiction to deal with the review application? These are some of the considerations that arise in the decision under notice.

RAM GOPAL GHOSE *v.* DHIRENDRA NATH SEN, I L R 54 Cal. 380.

In this case, a learned Judge of the Calcutta High Court has differed from the long series of cases commencing from *Krishna Aiyar* v. *Krishnasami Aiyar* (2) and ending with *Raghunath Singh* v. *Sri Narain* (3) to the effect that when a promissory note is executed by the manager of a joint family and the loan is contracted for purposes binding on the family, a decree can be obtained against the other members of the family in a suit based on the note. It may be noticed in this connection that doubts have been entertained of the correctness of the decision in *Krishna Aiyar* v. *Krishnasami Aiyar* (2) by Messrs. Bhashyam and Adiga in their well-known commentaries on the Negotiable Instruments Act. *See* pp. 516, 517, 3rd edition. The question is one of constant occurrence and a conflict of decisions on it will therefore cause considerable embarrassment to the subordinate courts. Of all the decisions referred to by the learned Judge in support of his view, except the decision in *Vithalrao* v. *Vithalrao* (4), no other case dealt with the exact question of a manager of a joint family. The case in *Sadusuk Janki Deo* v. *Maharaja Sir Kishan Pershad* (5) on which very strong reliance has been placed by the learned

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1. (1925) 23 A L J 674. 2. (1900) I L R 23 M 597.
3. (1923) I L R 45 A 434. 4. (1922) 25 Bom. L R 151.
5. (1918) L R 46 I A 33 : 36 M L J 429 (P C).

Judge was a case of strict agency falling under Ss. 27 and 28 of the Negotiable Instruments Act. Indeed, its effect was restricted to cases of agency in *Krishnanand Nath Khare* v. *Raja Ram Singh* (1). The manager of a joint family is clearly not an agent of the family. Ss. 27 and 28 must therefore be conceded to have no direct application to the cases of joint families. Again the observations of James, L. J., in *In re Adansonia Fibre Co.* (2), cannot be directly applied to the case of a Hindu joint family as Indian law knows more of joint families, their character and incidents than of corporations or partnerships and it cannot be dismissed as not coming within any well-known category of association of persons known to law. In saying this, we do not fail to perceive the full force of the observations of the learned Judge in the case under notice about the want of clearness in the reasoning of the majority of the Judges in *Krishna Aiyar* v. *Krishnasami Aiyar* (3). It must be admitted that in the above case the majority have to some extent confused the liability for the debt and that under the pronote. It must be observed at the same time that the question whether in any case the debt is merged in the pronote or not is somewhat metaphysical and has led to conflicting decisions. See *Muthu Sastrigal* v. *Viswanatha Pandarasannadhi* (4) and *Shanmughanatha Chettiar* v. *Srinivasa Aiyar* (5), though we venture to think that the view in the latter case is preferable and accords more with justice and the decision in *Sadusuk Janki Deo* v. *Maharaja Sir Kishan Pershad* (6). Under these conditions we are not sure whether the rule of *stare decisis* may not have been applied especially because the legislature has not stepped in, notwithstanding that there have been occasional amendments of the Act, in recent years. In the case under review, apparently, the manager did not purport to execute the note as such. It may, therefore, be still a question whether if the manager purports to execute the note in that capacity, the other members can be made liable on the note, if it was executed for a binding purpose. Here it may be observed that the learned Judge in more than one place refers to the application of the amount for purposes binding on the family as necessary for binding the other members. We venture to think that this is merely a slip as it has long been established that it is the purpose

1 (1922) I L R 44 A 393. 2. (1874) 9 Ch. A 635.
3. (1900) I L R 23 M 597. 4. (1913) I L R 38 M 660 26 M L J 19.
5. (1916) I L R 40 M 727 · 31 M L J 138.
6. (1918) L R 46 I A 33 : 36 M L J 429 (P C).

for which the loan is incurred that makes the loan binding on the other members and not the application of the money borrowed. See *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonwaree* (1) and *Krishn Das* v. *Nathu Ram* (2). On the view taken by the learned Judge we do not believe that even promissory notes executed by managers of trading families would stand on any different footing. It may be finally submitted that the framing of the suit on the original cause of action as well will not in all cases remove the hardship involved in the view taken by the learned Judge. For instance, in cases where there have been acknowledgments of the liability under the note, it may be difficult to contend that a suit on the original consideration would be saved from the bar of limitation. Again where the note has been negotiated to strangers, the indorsee may not be able to maintain an action on the original cause of action against the other members of the family. Cf. *Shanmughanatha Chettiar* v. *Srinivasa Aiyar* (3). In *Nataraja Naicken* v. *Ayyaswami Pillai* (4) it has even been held that a suit on the note itself can be maintained by the indorsee against the other members of the family.

EAST INDIAN RAILWAY COMPANY v. BADRI NARAIN, I L R 6 Pat. 445.

This is a clear case and supported by ancient authority. The Privy Council laid down long ago in *Durga Das* v. *Ramanadha Chowdhry* (5) that costs of a suit are in no sense the subject-matter of the suit and the amount of costs cannot be taken into account in arriving at the appealable value of Rs. 10,000 for purposes of an appeal to the Privy Council. The decision in the case is to the same effect though no reference is made to the Privy Council decisions. It is quite a different matter that a party appealing specifically against an order for costs irrespective of or in addition to other portions of the decree on the merits is bound to pay Court-fee on the amount of costs appealed against. For the purposes of S. 110 of the Civil Procedure Code it is settled by authority that costs are not the subject-matter of the suit.

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1 (1856) 6 M I A 393 2. (1926) L R 54 I A 79 : 52 M L J 720 (P C)
3 (1916) I L R 40 M 727 . 31 M L J 138 4. (1917) 32 M L J 354
5. (1860) 8 M I A 262.

JESA RAM *v.* THE COMMISSIONER OF INCOME-TAX, I L R 8 Lah. 347.

GANESH DAS *v.* THE COMMISSIONER OF INCOME-TAX, I L R 8 Lah. 354.

The extent and scope of the power of the Income-tax Commissioner under S. 33 of the Income-tax Act (XI of 1922) to call for the record of any proceeding under the Act and to pass such orders thereon as he may think fit, came up for discussion in the above cases. The judgments negative the contention of the Commissioner that there is no time-limit for the exercise of his powers under S. 33 and hold that the restriction as to limitation under S. 34 and S. 35 of the Act are applicable to the Commissioner acting under S. 33 as well. Reliance is placed by their Lordships on the use of the words "subject to the provisions of this Act" in S. 33, as indicating the intention of the Legislature. It may be noted that these particular words are an addition in the new Act and that no such words are found in the corresponding section of the old Act (VII of 1918). The whole question is discussed much more fully in the judgment of the Madras High Court in *Commissioner of Income-tax* v. *Sheik Abdul Kadir Marakkayar & Co.* (1). As pointed out in the said decision the so-called power of review under S. 33 is really a revisional power by way of superintendence. It follows that the Commissioner has no power to initiate proceedings under S. 34 or S. 35 either to assess or re-assess income which has escaped assessment or to rectify any mistake. These specific powers can be exercised only by the Income-tax Officer, and that in the manner indicated and within the period of limitation provided for by S. 34 and S. 35. The proper service of the notice prescribed by the section is a condition precedent to the exercise of such jurisdiction. The Commissioner will therefore be incompetent to impose any additional tax after the expiry of the statutory period and S. 33 does not empower him to do so. The exercise by the Commissioner of this power of revision under S. 33 of any proceedings properly initiated by the Income-tax Officer under Ss. 34 and 35 however does not come under any statutory period of limitation and the matter is left at large. On general principles such powers of revision ought to be exercised within a reasonable time.

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1. (1927) M W N 611.

Secretary of State for India in Council *v.* Nistarini Annie Mitter, I. L. R. 6 Pat. 446.

The question in this case was whether a lease deed by the Government can be described as a "document purporting to be or to evidence grants or assignments by Government of land or any interest in land" within the meaning of S. 90 (1) (*d*) of the Registration Act, 1908 and as such exempt from registration. It has been answered in the negative by the Allahabad High Court in ***Munshi Lal* v. *The Notified Area of Baraut*** (1) and in the affirmative by the Madras High Court in ***Kallingal Moosa Kutti* v. *The Secretary of State for India*** (2). The decision under notice agrees with the Madras view and we think rightly. Though at first sight it may appear to be a clumsy way of describing an ordinary lease-deed as a document evidencing a grant of an interest in land, the language of S. 90 cannot be said to be inapplicable. The reference to "sanads and inam title-deeds" in S. 90 also indicates that grants of any interest in land by the Government even though subject to conditions are subject to the exemption from registration. There is no reason for limiting the exemption to such documents only as pass the whole interest of the grantor without reservation. Sanads granted by Government are frequently subject to conditions, as, for instance, sanads in respect of service tenures. Nor is there anything in the language of S. 90 to indicate that a restricted interpretation should be placed on it so as to exclude ordinary lease-deeds. The provisions of the Act relating to exemption from registration of certain classes of documents when they are executed by the Government are partly found in S. 17 and partly in S. 90. This piece of inartistic drafting should not, however, be understood as justifying an inference that the class of documents mentioned in S. 17, cls. (*a*) and (*b*) is not intended to be included in the general description of the language used in S. 90.

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1. (1914) I L R 36 A 176.
2. (1920) I L R 43 M 65 : 37 M L J 332.

RAM CHARAN SAHU *v.* MATA PRASAD, I L R 49 All. 565.

In a suit for possession and mesne profits past and future the Court failed to include future mesne profits in the decree. The question was whether a subsequent suit for mesne profits for that period is barred. Their Lordships merely indicate the difference of opinion that exists on that point but decide the question on a point of limitation, *viz.*, that the suit for mesne profits should be instituted within three years under Art. 109 of the receipt of the profits. The way in which the article was sought to be got over was (1) that the limitation was suspended during the pendency of the previous litigation, (2) that it was only by the Appellate Court's decision that the plaintiff was held entitled to unconditional possession and therefore limitation should be held to start only from the date of declaration of plaintiff's unconditional right to possession. Both these arguments their Lordships repel and hold that the claim was barred.

The view in favour of suspension of limitation for reasons other than those provided in the Limitation Act is being discredited—almost all the High Courts in recent cases have pronounced in a contrary sense on the question [*Satyanarayana Brahmam* v. *Seethayya* (1), *Smt. Sarat Kamini Dasi* v. *Nagendra Nath Pal* (2) and the Allahabad High Court in this case]. The only case in the way *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (3) is explained as a case of S. 14, Limitation Act, interpreted liberally. Pendency of litigation in respect of the subject-matter is a legitimate factor to be taken into consideration in determining the starting point of limitation under the 3rd column when the language admits of such a benevolent interpretation. *Bassu Kuar* v. *Dhum Singh* (4) was a case of such benevolent interpretation applied to Art. 97, *Baijnath Sahai* v. *Ramgut Singh* (5) to Art. 12, *Muthu Korakkai Chetty* v. *Madar Ammal* (6) to Art. 180, and *Rangayya Appa Rao* v. *Bobba Sriramulu* (7) to Art. 110. Art. 109 does not admit of such a manipulation and the declaration of the Court as to plaintiff's right to unconditional possession could not give a fresh starting point, for Courts ordinarily only declare rights and do not

1. (1926) I L R 50 M 417.
2. (1925) 29 C W N 973.
3. (1916) I L R 43 C 660 (P C).
4. (1888) I L R 11 A 47 (P C).
5. (1896) I L R 23 C 775 (P C).
6. (1919) I L R 43 M 185 (F B).
7. (1903) I L R 27 M 143 (P C).

create rights. Where they may be said to be creating rights as in the case of setting aside voidable transactions, it is quite true that after the decree there might be rights arising but so far as claim to mesne profits for the antecedent period is concerned, that is a matter which they should provide for in settling the equities and if they do not provide for them, there would be no further right to litigate about the same matter.

GOSWAMI GORDHAN *v.* BISHAMBAR, I L R 49 All. 597.

The fallacy in the reasoning in this case is that a claim for future mesne profits is taken to be a relief in respect of the same cause of action as possession. That the cause of action is not the same has been held in numerous cases and that affords the justification for the string of cases which hold that a suit for possession does not bar the suit for even past mesne profits. The cause of action for future mesne profits did not even accrue at the date of the plaint for the suit for possession. Suits for redemption stand on an entirely different footing; there the cause of action is the mortgage and all claims in respect of the mortgage by way of accounts or otherwise should be settled by the decree and cannot be agitated after the decree.

AMAR SINGH *v.* GOBIND RAM, I L R 49 All. 606.

Estoppel against estoppel setteth the matter at large is a familiar principle but cannot obviously apply to *res judicata.* There the last decision must operate as *res judicata* because the previous decision if it did operate as such might and ought to have been pleaded in the previous suit and if it was not, the last decision must be constructively taken to have overruled the plea.

MAHARAJA OF DUMRAON *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL, I. L. R. 6 Pat. 481 : 53 M. L. J. 576 (P C).

This decision re-establishes the authority of the early decision of the Privy Council in *Lopez* v, *Muddun Mohun Thakoor*(1) which was supposed to be somewhat shaken by later decisions of their Lordships. Their Lordships not only reiterate the soundness of the principle laid down in the earlier case viz., that the law of acquisition by alluvion does not operate as confiscation of any private person's property and is applicable only to the gain which an individual proprietor may make from that which was part of the public property, the 'public domain' not usable in the ordinary sense but they apply the principle equally well where the diluviated land is re-formed *in situ* not merely on the same side of the river as in *Lopez's case* (1) but on the opposite side of the river as in the decision under notice. "It is a principle founded in universal law and justice that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano or a field covered by the sea or by a river, the ground, the site. the property remains in the original owner." It follows that an owner of property, whose land is diluviated and re-formed *in situ* is entitled to it, even if the re-formation is by gradual, slow and inperceptible means, as a result of fluvial action. The governing facts will be whether there has been an abandonment of the proprietary right in the diluviated site by the original owner and the identity of the newly formed land. The latter question is merely a matter of latitude and the longitude. There is nothing in principle to confine the law of accretion to longitudinal annexations only and to deny its operation in the case of vertical annexations. It is of course a different matter where after diluvion and before re-formation, the title of the original owner is either abandoned or lost by adverse possession. In such a case there being no competition with rights of private property the general law of accretion will apply unhampered.

MA PAING *v.* MAUNG SHWE HPAW, I. L. R. 5 Rang. 296 (F. B.).

To the student of comparative jurisprudence this decision of the Full Bench forms interesting reading. The Burmese

1. (1870) 13 M I A 467.

Buddhist Law on the rights of husband and wife during coverture is so special and peculiar that no useful analogy can be found in the laws of other systems of jurisprudence. It is interesting to note how the ancient and archaic rules are made to subserve the practical conditions of modern day commerce by reference to and adoption of substantive provisions of Partnership Law and processual rules about representative actions. The decision holds in effect, that husband and wife are partners and all the property of the marriage is partnership property. No doubt the shares of the husband and wife on dissolution of the partnership either by death or divorce are different and vary with the time and manner of the acquisitions. During coverture, however, neither party is entitled to separate possession nor can there be any alienation, voluntary or by execution process of the undivided share of either spouse. The rights of creditors are however safeguarded by applying the well-established rules of the Contract Act with reference to Partnership Law. One is easily reconciled to judicial legislation by decisions of this nature.

M. A. MAISTRY *v.* ABDUL AZIZ RAHMAN, I L R 5 Rang. 471.

The division Bench has in this case reversed the decision of the Trial Judge which is reported in *M. A. Maistry* v. *Abdul Azis Rahman* (1). In commenting on the decision on the previous occasion we pointed out that the decision was opposed to the principle of the ruling of the Privy Council in *Radha Raman Shaha* v. *Pran Nath Roy* (2). (See 52 M L J, Notes of Indian cases, p. 35). We are glad to note that our criticism has met with the approval of the Appellate Court and that the judgment of the Trial Judge has been revised on appeal.

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1. (1926) I L R 5 Rang. 46. 2. (1901) I L R 28 C 475 (P C).

SARAT CHANDRA BOSE *v.* BISWESWAR MITRA, I L R 54 Cal. 405.

The conflict of judicial opinion is thickening on the questions whether in any given case, the Court can set aside a decision passed on default under the provisions of O. IX of the Civil Procedure Code and whether or not resort can be had to the inherent powers of court when a case does not fall under O. IX. The references to the decisions noticed by the learned Judges in this case show that the conflict ought not to be allowed to grow so as to embarrass the lower courts, if already they are not embarrassed. The power to remedy this state of things is in the High Courts themselves without any resort to the legislature. The Courts are apparently not satisfied with the limits imposed by O. IX on their power to set aside judgments for default and they therefore invoke the aid of S. 151 for which there are some difficulties as pointed out in *Neelaveni* v. *Narayana Reddi* (1). If so the High Courts can avail themselves of their rule-making power and add suitable provisions in O. IX or elsewhere in the Code to meet really hard cases where there is no lack of diligence on the part of litigants with suitable safeguards as to costs or otherwise for the rights of the opposite party.

RAGHUNANDAN NANU *v.* HORMASJEE BEZONJEE, I L R 51 Bom. 342.

The question in this case is one of some interest and it is difficult to decide between the conflicting views of Shah, J., in the trial Court on the one hand and of the appellate court on the other. Two persons entered into an agreement purporting to be one of partnership under which one of them was to receive a fixed sum of money "in lieu of his share of profits" and was not to be liable for losses and the other was to continue to be the owner of the stock-in-trade even during the subsistence of the so-called partnership. They were spoken of throughout in the document as partners. The question was whether this agreement constituted them a partnership. Mr. Justice Shah held that it only created an agency and not a partnership and the appellate court took the contrary view. The learned Judges of the appellate court seem to have proceeded on the view that an actual sharing of the profits is not of the essence of a partnership. We find some difficulty in reconciling this view with the

1. (1919) I L R 43 M 94 : 37 M L J 599.

language of S. 239 which is the sole guide in this matter, the English or Indian decisions prior to the Act and the previous state of the law being no guides in the construction of the section as pointed out in *Raghumull Khandelwal* v. *The Official Assignee of Calcutta* (1) by a bench of three Judges. If in a year when the so-called partnership made only a loss and still one of them was entitled to his amount as admittedly he was in this case, how can it be said that there is a sharing of profits. The fixed amount seems only to partake of the character of a salary payable to him, by whatever name parties may choose to call it. We are not sure that the expression "salaried partner" used in common parlance and referred to by the learned Judges is not a legal misnomer. In all the English cases and Indian cases prior to the Act, though any reference to them is not strictly necessary, there have been controversies whether the right to a share of profits by itself or as such, made the recipient a partner. See *Mollwo, March & Co.* v. *The Court of Wards* (2). But we doubt whether a sharing of the profits with an incidental right to account was ever considered unessential to the constitution of a partnership. In a recent case in the Lahore High Court, the sharing of profits was considered of the essence of a partnership. See *Abid-ud-din* v. *Bisharat Ali* (3). It is therefore permissible to doubt whether the conclusion of Shah, J., was not the correct one in the case.

NILKANTH BALWANT *v.* VIDYA NARSINHA BHARATI, I L R 51 Bom. 430 (F. B.).

This decision of the Full Bench shows that the legislature has failed in its professed object of expediting the disposal of appeals to the Privy Council and curtailing the discretion of the High Court in extending the time for the appellant furnishing security for the costs of the respondent or making the deposit requisite for the purpose. As observed by the learned Chief Justice in the case under notice, if rule 9 of the Privy Council Rules imposes no limit of time to the discretion of the High Court in ordering security for the costs of the respondent in a Privy Council appeal and that seems to be the opinion of the Madras High Court in 48 M L J 19 (Notes of Recent Cases), it is immaterial whatever amendment is made in the terms of O. XLV, R. 7 of the Civil Procedure Code, because, as pointed out by his Lordship, nothing

1. (1923) 28 C W N 34. 2. (1872) L R I A Supp. Vol., 86.
3. (1927) I L R 8 Lah 310.

in the Civil Procedure Code can affect the operation of the rules framed by the Privy Council. It may perhaps be doubted whether S. 112 of the Code has not reference solely to cases coming before the Privy Council by the special leave of the Privy Council; but it must be admitted that the section is not clearly so restricted in its scope. If section 112 is therefore general in its character, there is no escaping the conclusion arrived at by the Full Bench in the case under notice that there is still an unfettered discretion. *Ram Dhan* v. *Prag Narain* (1) is really not against the view of the Full Bench as the decision was given only under O. XLV, R. 7 of the Code, and R. 9 of the Privy Council Rules was not considered. *J. N. Surty (Receiver)* v. *T. S. Chettyar Firm* (2) simply follows *Ram Dhan* v. *Prag Narain* (1) and it is somewhat strange that there is no discussion of the effect of R. 9, although apparently the attention of the learned Judges was drawn to *Nagireddi* v. *Saki Reddi* (3) where that rule is referred to. This rule was considered in *Nagireddi* v. *Saki Reddi* (3) but not very fully, and it is difficult to reconcile the meaning given to it in that case with that given in 48 M L J 19 (Notes of Recent cases), though in the latter case, the prior decision was distinguished as applying to cases falling only under the Civil Procedure Code. In the latter case, the learned Judges had not to consider the effect of S. 112 of the Civil Procedure Code. The conflict between the rules in the Civil Procedure Code and the Privy Council Rules would have been avoided if the construction of R. 9 by Fawcett, J., had been adopted by the Full Bench. But that view has not been taken even in the later Madras case referred to above. The result is not satisfactory in carrying out the avowed object of the legislature and the law remains much the same notwithstanding the amendment of O. XLV, R. 7 of the Civil Procedure Code.

DURGI *v.* KANHAIYA LAL, I. L. R. 49 All. 579.

So far as the validity of the disposition in favour of the widow is concerned, the judgment of the Privy Council in *Krishnamurthy Ayyar* v. *Krishnamurthy Ayyar* (4) must be taken to conclude the question and the sole question that remained we think is—what exactly is the nature of the estate created in favour of the widow. A widow's estate would undoubtedly

1. (1921) I L R 44 A 216. 2. (1926) I L R 4 R 265.
3. (1922) 18 L W 29. 4. (1927) I L R 50 M 508 : 53 M L J 57 (P C).

be divested by the adoption while there is absolutely no reason to hold that an absolute gift in her favour should be divested by the adoption. A will by the adopter in respect of his self-acquisition is not revoked by the adoption any more than by the birth of an *aurasa* son. Neither would a life-estate in favour of the widow be affected by the adoption but a bequest in favour of the widow coupled with a power to adopt may generally be construed as a grant of a widow's estate which will be divested by the adoption. In this case, the testator had given an absolute estate to the widow and had also clearly expressed that during her lifetime, the adopted son should have no power over the estate.

CHANDRASHEKHAR *v.* AMIR BEGUM, I. L. R. 49 All. 592.

In the absence of a rule like that enacted in O. 9, R. 8 in respect of suits, there is nothing to preclude a person from making any number of applications in respect of the same subject-matter so long as there is no disposal of the question on the merits. The application to make a final decree being an application in a suit, S. 141 would not apply to it and consequently there could be no justification for the argument that O. 9, R. 8, could apply to the case. The article of limitation applicable to such an application is Art. 181 and there is no provision in respect of that article like that in Art. 182, cl. (5), to give the applicant the benefit of previous applications to save limitation. Provided, so that, the applicant is within 3 years of the accruing of the right to apply, he may make any number of applications. Their Lordships of the Privy Council having ruled in *Lachmi Narain Marwari* v. *Balmakund Marwari* (1) that after a preliminary decree the suit itself cannot be dismissed for default, the party is safe for 3 years after the accrual of the right to apply and this is not to be regretted as the obstructions and pitfalls placed in the way of an honest claimant by the Indian Procedure are many and having regard to the fact that the chances of recovery of the fruits of litigation are rendered so often doubtful by the combined operation of processual difficulties and the chicanery of the judgment-debtors.

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1. (1924) L R 51 I A 321 : 47 M L J 441 (P C).

VERTANNES AND OTHERS *v.* ROBINSON AND ANOTHER, I L R 5 Rang. 427 : 53 M L J 71 (P C).

Even under English Law the expression *"effects"* in a will may in certain contexts include real estate though primarily the word refers to personal estate or moveables . In India where there is little distinction between moveable and immoveable property the expression is certainly of sufficient amplitude to include immoveable property. Still, the Privy Council reversed the decision of the High Court in this case as the context showed that there was no intention on the part of the testator to bequeath any other immoveable properties besides the houses expressly devised already and the collocation of words used along with the expression *'effects'* also pointed to the same conclusion. It followed therefore that there was an intestacy with reference to the lands in dispute which therefore devolved upon the heirs under the law of intestate succession. The conveyance by the executrix in favour of a purchaser was therefore inoperative to pass the title to the shares of the heirs other than that of the executrix herself who was entitled to one third of the properties as one of the heirs of the testator. Nor could the sale be upheld as an act required for the administration of the estate as it was found that long prior to the sale in question, the estate had been completely and properly administered. The decision in *Bijraj Nopani* v. *Pura Sundary Dasee* (1) had obviously no application to the present case, as the sale here was not in the course of administration and for that purpose. The sale in the present case could not have been valid even if the vendor purported to convey the property expressly in her capacity as executrix. In the circumstances of the case, her character as executrix had ceased and she was holding the shares belonging to the other heirs only as trustee for them.

Their Lordships also hold that there was no estoppel under S. 115 of the Indian Evidence Act, as the purchaser did not act on any representation of the other heirs of the testator. Their Lordships find as a fact that both the purchaser and the beneficiaries were equally ignorant of the real rights of the parties and were under a common error. It may be noted that as regards one of the heirs the Privy Council hold that he is estopped under S. 116 by reason of his having attorned as a tenant to the purchaser. The judgment of their Lordships which allows a decree of ejectment against him and a declaration that the plaintiff-purchaser was entitled to the share of that particular defendant should not however be understood as

1. (1914) I L R 42 C 56 : 27 M L J 93 (P C).

finally deciding that he cannot recover his share in a properly constituted suit after first surrendering possession of the property. The refefrence to their Lordships' judgment in *Bilas Kunwar* v. *Desraj Ranjit Singh* (2) only shows that no question of title can be investigated in this suit before possession is surrendered. In the absence of a finding of an estoppel under S. 115, sueh title, if any, can be established in a separate action as plaintiff.

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SONIRAM JEETMULL *v.* R. D. TATA & CO., LTD., I L R 5 Rang. 451: 53 M L J 25. (P C).

It is a well established rule of English common Law that a debtor should seek out the creditor and pay him at the place where the creditor resides. This duty however is, as observed by the Privy Council in the case of *Bansilal Abirchand v. Ghulam Mahbul Khan* (3), only imposed upon him when the creditor is within the realm. The question has been raised in some cases whether the rule is applicable under the Indian Law, because of S. 49 of the Indian Contract Act. The Privy Council hold in the decision under review that S. 49 of the Indian Contract Act as to the place of performance does not get rid of inferences that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him. The place of performance need not necessarily be expressed in terms in the contract itself, but the same may appear sufficiently by clear implication. Notwithstanding the doubts expressed in *Raman Chettiar* v. *Gopalachari* (4), such an implication as to the place of performance may be made not merely from the terms of the contract but also from the necessities of the case and the Court is entitled to consider the circumstances in which the contract was made. Once the Court comes to a conclusion as to a place of performance fixed by the contract either expressly or by implication, S. 49 of the Contratc Act has no application. The jurisdiction of a particular civil court to entertain suits for the recovery of a loan or payment of money due under a contract depends upon whether a part of the cause of action arises within the local limits of the jurisdiction of the court, S. 20, cl. (*c*) of the Code of Civil Procedure, and the courts of the place where the payment of money is to be made will therefore have jurisdiction. It does not however follow that the mere fact of re-

2. (1915) I L R 37 A 557 : 29 M L J 335 (P C).
3. (1925) I L R 53 C 89 · 49 M L J 806 (P C).
4. (1908) I L R 31 M 223.

sidence of a promisee a particular place would be a sufficient circumstance in itself in all cases to raise an implication of an intention to fix that place as the place of performance of a contract. Their Lordships point out that in the particular case there were other circumstances which indisputably pointed out the place of performance. The nature of the business, the origin of the debts, the course of dealing and the necessities of the case are all relied upon by their Lordships as indicating the intention of the parties as to the place of performance of the obligation undertaken. The change of language in S. 20 of the Civil Procedure Code should also be noted in this connection, the legislature having omitted the definition which was contained in the old Procedure Code.

MUSSAMUT GULJANIA *v.* KING EMPEROR, I L R 6 Pat. 583.

S. 239 cl. (*f*) of the Code of Criminal Procedure provides for a joint trial of persons accused of offences under Ss. 411 and 414 of the Indian Penal Code or either of these sections in respect of stolen property "the possession of which has been transferred by one offence" This decision holds that the transfer referred to in the qualifying clause can only be the change of possession from the owner to the thief and not the transfer of possession of the stolen articles from the thief to the receivers. Where, therefore, several articles, stolen in the course of a single theft, are transferred to different persons by different transactions, there can now be a joint trial of the several receivers of the stolen property for offences under S. 411 of the Indian Penal Code. Prior to the amendment of S. 239 by the Criminal Procedure Code Amendment Act of 1923, such a joint trial was held illegal by the High Courts as the respective offences could not be regarded as offences committed in the same transaction within the meaning of the old S. 239. The amendment has now provided for a joint trial in such cases. The use of the word 'transfer' to denote the removal of possession of the stolen articles by the thief can hardly be regarded as accurate or appropriate. Notwithstanding the somewhat obscure language of the section it is clearly the intention of the legislature to take in the class of cases where the original removal of the articles was by a single offence of theft, although the subsequent disposal of the stolen articles was by different transactions to different persons. The contention that the transfer of possession referred to is the transfer by the thief to the receivers cannot be accepted as such a construction of the language used will render S. 239 clause (*f*) itself a superfluity.

ISHWARI PRASAD *v.* RAI HARI PRASAD LAL, I L R 6 Pat. 506.

This is an interesting judgment which deals exhaustsively with the question whether the Kayasthas of Bihar are Kshatriyas or Sudras. The Calcutta High Court has been holding that the Kayasthas of Bengal at any rate are now Sudras though originally they seem to have been recognised as Kshatriyas, *Asita Mohan Ghosh* v. *Nirod Mohan Gosh* (1). Reliance was largely placed on the authority of the Vyavastha Darpana of Shyama Churn Sircar. The exact question was however left open by the Privy Council when the abovementioned case went up to them, *Asita Mohan Ghosh* v. *Nirode Mohan Ghosh* (2). Notwithstanding this, the Calcutta High Court has even in its later judgments adhered to the same view. This view has been condemned by Indian scholars of repute, vide Sircar Sastri's Hindu Law, page 123, Sarvadhicari's "The Principles of Hindu Law of Inheritance", page 835, and J. C. Ghose's Hindu Law', page 1006. Even the Kayasthas of Bihar were held to be Sudras only by the Calcutta High Court in *Raj Coomar Lal* v *Bisesuar Dayal* (3). On the other hand, the Allahabad High Court had doubted the correctness of the above decision at any rate as regards the "twelve castes of Kayasthas of Upper India such as the North Western Provinces and Oudh". See *Tulshi Ram* v. *Bihari Lal* (4).

The judgment under notice, having regard to the conflict of views and the obvious importance of the question affecting a large and influential community, proceeds to deal with the matter with reference to the original sources dealing with the origin, the tradition and the history of the community and also the social position and occupation of the Kayasthas. The examination of the original authorities cited in the judgment can hardly lead to any other conclusion than that the Kayasthas were originally Kshatriyas and were recognised as such by Hindu society.The Kayasthas of Bihar observe the ceremonies in connection with marriages, deaths and births according to vedic rights that obtain in the case of regenerate classes. In the light of the materials which are marshalled in the judgment there can be no doubt that the Kayasthas of Bihar and Upper India who owe allegiance to Benares school of Hindu Law and the Mitakshara certainly belong to the twice-born classes and cannot be relegated to the position of Sudras.

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1. (1916) 20 C W N 901.
2. (1926) L R 47 I A 140.
3. (1884) 10 C 688.
4. (1890) I L R 12 A 328.

LAKSHMI NARAIN ACHARI *v.* MUTHU BHAGAT, I L R 49 All. 636.

The language of S. 73, Civil Procedure Code, is far from satisfactory, but there can be no doubt that the procedure under that section is far from appropriate for deciding the validity and extent of a mortgage claim even summarily. The Code contemplates a subsequent mortgagee who is a party to the suit on the prior mortgage to have his rights determined and protected in the action itself. It may be that by not so getting protected, he does not lose his right against the mortgagor or against the balance proceeds [*Barhamdeo Prasad* v. *Tara Chand* (1)]. A mortgagee who has not been made a party has no grievance because his rights cannot be affected by the proceedings. If he is a first mortgagee, then also his rights cannot be affected. The only persons whose claims may be affected by any hasty distribution under S. 73 are the second mortgagee who has beccome a party but has not got his rights protected or a subsequent mortgagee *pendente lite*. No doubt the Court will have to make some order in respect of their claims. The proper order to make possibly might be, on the *prima facie* case being made out, to keep the amount necessary to meet the claim of the mortgagee in court deposit leaving the parties to establish their rights in suit. S. 73, Civil Procedure Code, had no application to the case in hand, as here there were no money decree-holders applying for execution, so that the order of the Court could be only one under O. 34, R. 13. Under that rule also, the same principle should be the guide and it would not be a proper order to make to hand over the proceeds to the second encumbrancer without the consent of the mortgagor. The mortgagor also would not be entitled to the money, as the charge of the mortgagee would be transferred to the amount.

TAMIZ BANO *v.* NAND KISHORE, I L R 49 All. 645.

There is authority for the position that court can pass a decree against a legal representative personally if he is in possession of sufficient assets [*Nathuram Siviji Sett* v. *Kutti Haji* (2)]. When such a claim is made, all the questions, *viz.*, whether the defendant has assets, whe-

1. (1913) L R 41 I A 45 : I L R 41 C 654 : 26 M L J 243 (P C).
2. (1897) I L R 20 M 446.

ther he has administered them properly and nothing remains for the satisfaction of the debt woulud appropriately arise in such a suit and the court would have to decide them. Similarly, where a claim is made against an executor *de son tort*, possession of the assets itself is the cause of action and all those questions would naturally arise for discussion and determination. But when the suit is brought against the legal representative in his representative capacity for a decree against him out of the assets in his hands, there is no authority for holding that, at the defendant's option, the suit can be converted into a sort of administrative action when the extent of the assets and liabilities can be determined in the suit without the safeguards involved in an administration action. When a suit is brought in the first instance against the debtor himself and he dies pending the suit, in *Narayanaswami Naick* v. *Seshama Raju* (3), it was held that the decree could be only one against the assets and not one against the representative personally and rightly so, because in such a case the question of the existence of assets and liabilities does not properly arise. The contrary view would convert every suit on a bond, promissory note, or other claim, however trivial, into an administration action involving a general investigation into the affairs of the deceased. We think the view of Mr. Justicc Mukerjee is more in accordance with principle than the view of the other learned Judge, though the further principles laid down by the latter as regards the rights and liabilities of the heir in the administration of the estate seem to be sound. Apart from cases to which the Probate and Administration Act applies, the heir is not bound to pay the debts *pro rata* and he is entitled to a right of retainer and, if the debts that he has paid or those in respect of which he is entitled to a right of retainer are equivalent to the value of the assets in his possession, his liability ceases and he is not required further to show that he has actually sold the assets for the purpose of administration, nor does there seem to be any liability on the part of the heir to reduce the estate into possession.

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3. (1907) 18 M L J 36.

MUSSAMMAT LACHHMI *v.* MUSSAMMAT BHULLI, I L R 8 Lah. 384 (F B).

We invite attention to this elaborate judgment of the Full Bench of the Lahore High Court which deals with a point on the law of *res judicata* on which there has been a considerable divergence of views among the High Courts. Where two cross suits between the same parties are disposed of by a common judgment but two separate decrees are drawn up, the question frequently arises whether appeals should be filed against both the decrees. Where only one appeal is filed, is the hearing of the appeal barred by *res-judicata* by the existence of the other decree which has not been appealed from and which has become final? This judgment deals exhaustively with all the various authorities which have considered the question and the majority of the Judges hold that, neither by the terms of S. 11 of the Civil Procedure Code nor on general principles of *res-judicata,* is it necessary to appeal against both the decrees. It would be a great technicality to set up the very judgment which is appealed against, as operating by way of *res-judicata,* to prevent the hearing of the appeal. The Madras High Court has always been holding against the doctrine of *res-judicata* in such cases. *Panchanada Velan* v. *Vaithianatha Sastrial* (1), *Ramasami Chetty* v. *Karuppan Chetty* (2). Part of the reasoning on which the Madras Full Bench decision proceeds is no longer sustainable in view of the decision of the Privy Council in *Naganna* v. *Venkatappayya* (3) explaining the exact scope and limits of the doctrine of "subordinate and dependent judgments" and re-affirming the rule in *Marriot* v. *Hampton* (4). The Allahabad and Calcutta High Courts have been taking conflicting views and the question remains unsettled notwithstanding the latest Full Bench judgment of the Allahabad Court in *Ghansham Singh* v. *Bhola Singh* (5). The judgment under notice is a useful contribution to the discussion on the question which can, however, by no means be taken to have been quite settled yet.

SAI *v.* THE CROWN, I L R 8 Lah. 496.

The Criminal Procedure Code amendment Act of 1923 has abolished the sanction procedure under the old section 195. The

1. (1905) I L R 29 M 333. 16 M L J 63 (F B).
2. (1915) 29 M L J 551.
3. (1923) L R 50 I A 301 : I L R 46 M 895 : 45 M L J 657 (P C).
4. (1797) 7 Term Rep. 269 : 101 E R 969.
5. (1923) I L R 45 A 506 (F B).

Court or the public officer concerned has now to make a complaint in writing. Except that the complainant need not be examined by the Magistrate and that postponement of issue of process against the accused under S. 202 is not applicable to such complaints when made by a Court, the complaint by the Court will be in the other respects like any other complaint by a private person. A Court which makes a complaint under S. 476, will therefore be incompetent to try that case as no person can be a complainant and a Judge at the same time in the same matter. This disability will on general principles extend also to hearing of appeals arising out of such complaint. Whether or not S. 556 of the Code applies to such cases, there can be no doubt that the same officer cannot be the complainant and the appellate Court. It may be noted in this connection that the intention of the legislature is also made clear by the repeal of S. 477 of the old code. A Sessions Judge who preferred a complaint under S. 476 cannot therefore himself try the case on appeal. It may not follow however that the successor in office is under a similar disability.

DHANNA MAL AND OTHERS v. MOTI SAGAR, L R 54 I A 178 : I L R 8 Lah. 573 : 52 M L J 663 (P. C.).

It must now be taken to be well-established that a finding in a prior litigation, which was adverse to the party who succeeded in the same, could not be *res-judicata* against him in a later litigation. *Midnapur Zamindari Company* v. *Naresh Narayan Roy* (1), *Ramasami Reddi* v. *Marudai Reddi* (2). The decision to the contrary in *Veerasami Mudali* v. *Palaniappan* (3) does not appear to be sound, and the distinction based on the discretionary order as to costs of the earlier suit being based on the adjudication of rights therein is not convincing. It is also equally well-estbalished that it is only the findings of the ultimate Court of final appeal in the earlier suit on which the decree is based that could be *res-judicta* in subsequent proceedings and that the other findings of the lower courts should be deemed to be unnecessary for the disposal of the earlier case and such matter is not heard and finally decided within the meaning of S. 11, Civil Procedure Code. *Sheosagar Singh* v. *Sitarani Singh* (4), *Abdulla Ashgar Ali Khan* v. *Ganesh Dass*(5)

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1. (1920) L R 48 I A 49 : I L R 48 C 460 (P C).
2. (1923) I L R 47 M 453 : 46 M L J 198.
3. (1923) 46 M L J 515. 4. (1897) L R 24 I A 50 : I L R 24 C 616 (P C)
5. (1917) L R 44 I A 213 : I L R 45 C 442 : 34 M L J 12 (P C).

An issue which in terms is left open by the judgment in a prior suit cannot also be regarded as having been finally decided, whatever the implications of the decree in the earlier case may be An instance of this class of cases is the decision of the Privy Council in *Parsotam Gir* v. *Narbada Gir* (1). The decision in the case now under review is also based on similar principles. It will be noted that the judgment of the District Judge in the first instance purported to proceed on the basis that decision on the question of permanent tenancy set up by the defendants was irrelavant and unnecessary for deciding on the alleged right of the plaintiff to enhance the rent. The order on the review application made to the same Judge clearly showed that he understood his previous judgment not to decide the question of permanent tenancy one way or other. Their Lordships point out that the order on the review application must be taken to be in substance, a withdrawal of the tentative pronouncement in the original judgment and there was no concluded opinion of the Judge on the question of permanent tenancy in the earlier litigation. The case will therefore come within the principle of the ruling in *Parsotam Gir* v. *Narbada Gir* (1), however difficult it may be to uphold the increase of rent decreed in the earlier suit without reference to the main question of the nature of the tenancy.

The principle of the present decision will however be entirely inapplicable to cases where the judgment and decree in the earlier suit do decide disputed issues between the parties and there is merely an opinion of the judge embodied in the judgment that such decision will not be *res-judicata* in later proceedings. In such cases the decision of the Judge will be disregarded as an erroneous opinion on a point of law as regards the effect of his judgment in later proceedings and such prior decision will have their normal and full operation as conclusive adjudications binding on the parties, notwithstanding the rider attempting to qualify their legal effect.

NIAMAT RAI *v.* DIN DAYAL, L R 54 I A 211 : I L R 8 Lah. 597 : 52 M L J 729 (P C).

The recent decisions of the Privy Council in *Sri Krishna Das* v. *Nathu Ram* (2) and in the case under notice, have to be welcomed as liberalising the administration of Hindu Law

1. (1899) L R 26 I A 175 : I L R 21 A 505 (P C).
2. (1926) L R 54 I A 79 : I L R 49 A 149 : 52 M L J 720 (P C).

with regard to the sales of joint family properties under the Mitakshara System. Where transactions of sale of joint family properties by managers are challenged after a lapse of time, the difficulties of proving the application of the entire sale proceeds for purposes binding on the joint family are in practice found to be considerable. These decisions lay down authoritatively that the validity of such sales cannot be made to depend upon principles of strict accounting. The real question in such cases is "whether the sale itself is justified by necessity". If the purchaser has acted honestly, if the existence of a family necessity for sale is made out and the price is not unreasonably low, the purchaser is not bound to account for the application of the price. *Gauri Shankar* v. *Jiwan Singh* (3). Where, however, the evidence makes it clear that a substantial part of the consideration was applied for the discharge of previous debts binding on the family, it is clear that the sale cannot be set aside merely because a part of the proceeds is not proved to have been applied to purposes of necessity. Even in such cases the purchaser cannot be directed to pay over once again such balance of consideration as was not proved to have been so applied. In the decision under notice, the manager was held justified in selling the family properties for the purpose of discharging family debts and for raising funds to carry on a family business. It may be useful to remember, as their Lordships point out, that the question whether a family business should be closed down or carried on by raising more moneys is essentially a matter for the manager to decide and a purchaser or lender is not obliged to canvass the matter and decide at his peril according as the venture proves successful or otherwise. Their Lordships also reject a contention that the validity of the sale should be judged only with reference to the conditions at the time of negotiation and not with reference to the conditions at the time of the actual execution of the sale. Some of the considerations which may affect the validity of such sales, notwithstanding the above decisions, will be found detailed in 52 M L J 44 (N I C).

[END OF VOLUME LIII.]

3. (1927) 53 M L J 786 (P C).